

91-672

No. 91-1

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES OF THE CLERK

OCTOBER TERM, 1991

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION;
HARLEM HOSPITAL CENTER;
COLUMBIA UNIVERSITY
COLLEGE OF PHYSICIANS
AND SURGEONS; and
DR. R. LINSY FARRIS,

Petitioners,

-against-

DR. IFEOMA EZEKWO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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October 25, 1991

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QUESTIONS PRESENTED

1. Has a medical resident been deprived of a constitutionally protected property interest when she has been denied the opportunity to serve as chief resident in rotation for a four month period when the resident was allowed to complete her residency and has begun a medical practice in the specialty of her choice, and the resident did not show that the denial of the chief residency has interfered with her career plans in any tangible way, and the Second Circuit found that the only "actual damage" suffered by the resident was a salary differential of \$675.00?

2. Assuming arguendo that the above-described resident was deprived of a property interest, was due process satisfied when the decision to deny her the chief residency was made for academic reasons and was made after faculty members carefully considered the resident's performance and test scores over a two year period?

PARTIES

The parties in this case are:

1. The New York City Health and Hospitals Corporation;

2. Harlem Hospital Center (a division of the New York City Health and Hospitals Corporation);

3. The Columbia University College of Physicians and Surgeons (a division of Columbia University, which was incorporated in 1810 as "The Trustees of Columbia University in the City of New York");

4. Dr. R. Linsy Farris;

5. Dr. Ifeoma Ezekwo.

Parties 1, 2, 3, and 4 were defendants when this case was commenced and are petitioners before this Court. Party 5 was the plaintiff when this case was commenced and is respondent before this Court. Party 1, the New York City Health and Hospitals Corporation, has the following corporate subsidiaries: Nurse Referrals, Inc., and Outpatient Pharmacies, Inc. Party 3, Columbia University, has the following corporate subsidiaries: Aethelstane, Inc., Camp Columbia, Inc., Morningside Heights

**Legal Services, Inc., Reid Hall, Inc., The
Columbia University Presbyterian Medical
Center Fund, Inc., and University Women's
Realty Corporation.**

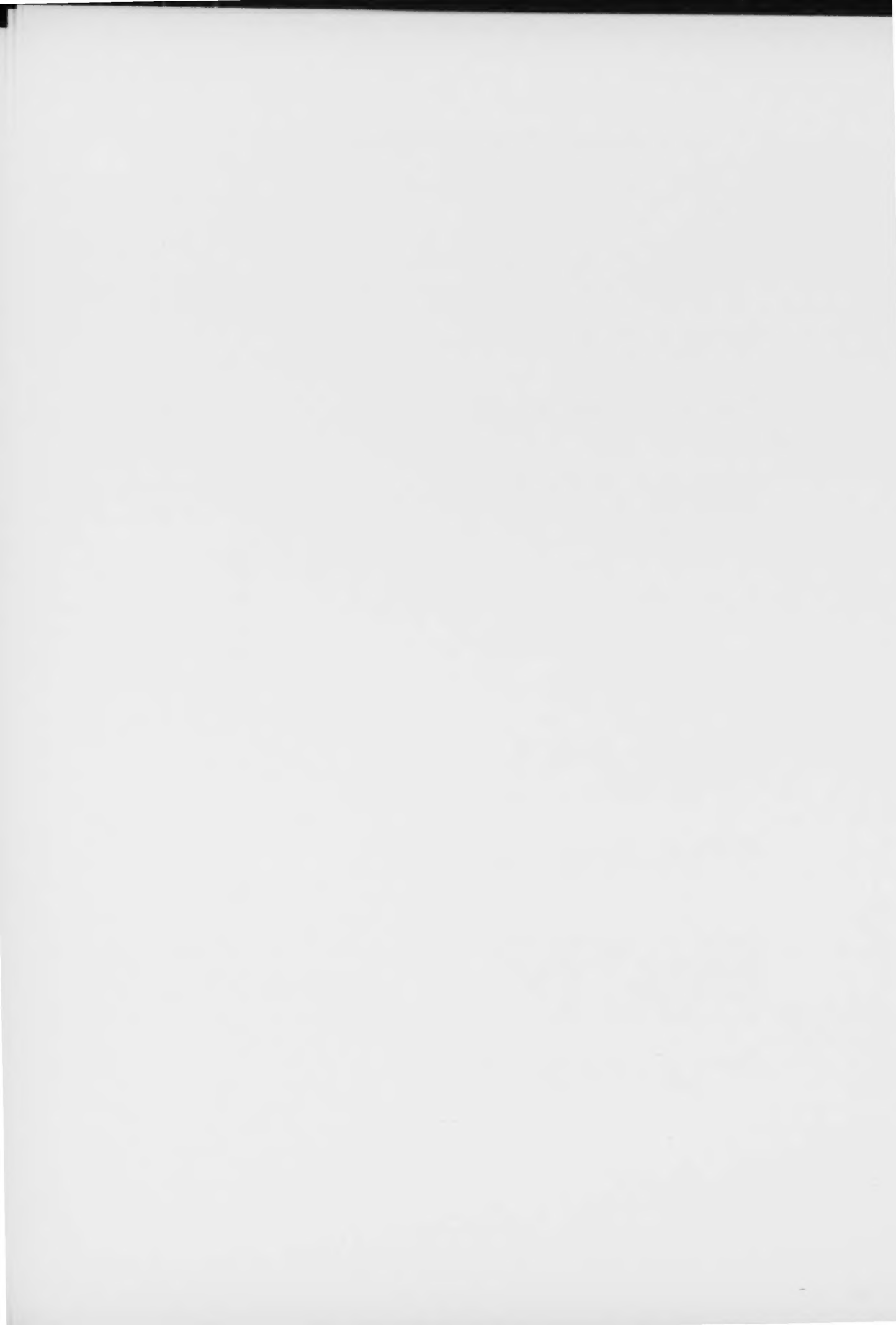
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PETITION FOR A WRIT OF CERTIORARI TO
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The petitioners, the New York City Health and Hospitals Corporation, Harlem Hospital Center, the Columbia University College of Physicians and Surgeons, and Dr. R. Linsy Farris, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of



Appeals entered in the above entitled proceeding on August 1, 1991.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York has not been officially reported. A copy is reprinted in the Appendix to this petition at page A1. The opinion of the United States Court of Appeals for the Second Circuit is reported at 940 F.2d 775. A copy is reprinted in the Appendix to this petition at page A15.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered August 1, 1991. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). This petition has been filed within the time allowed by law.



CONSTITUTIONAL PROVISION

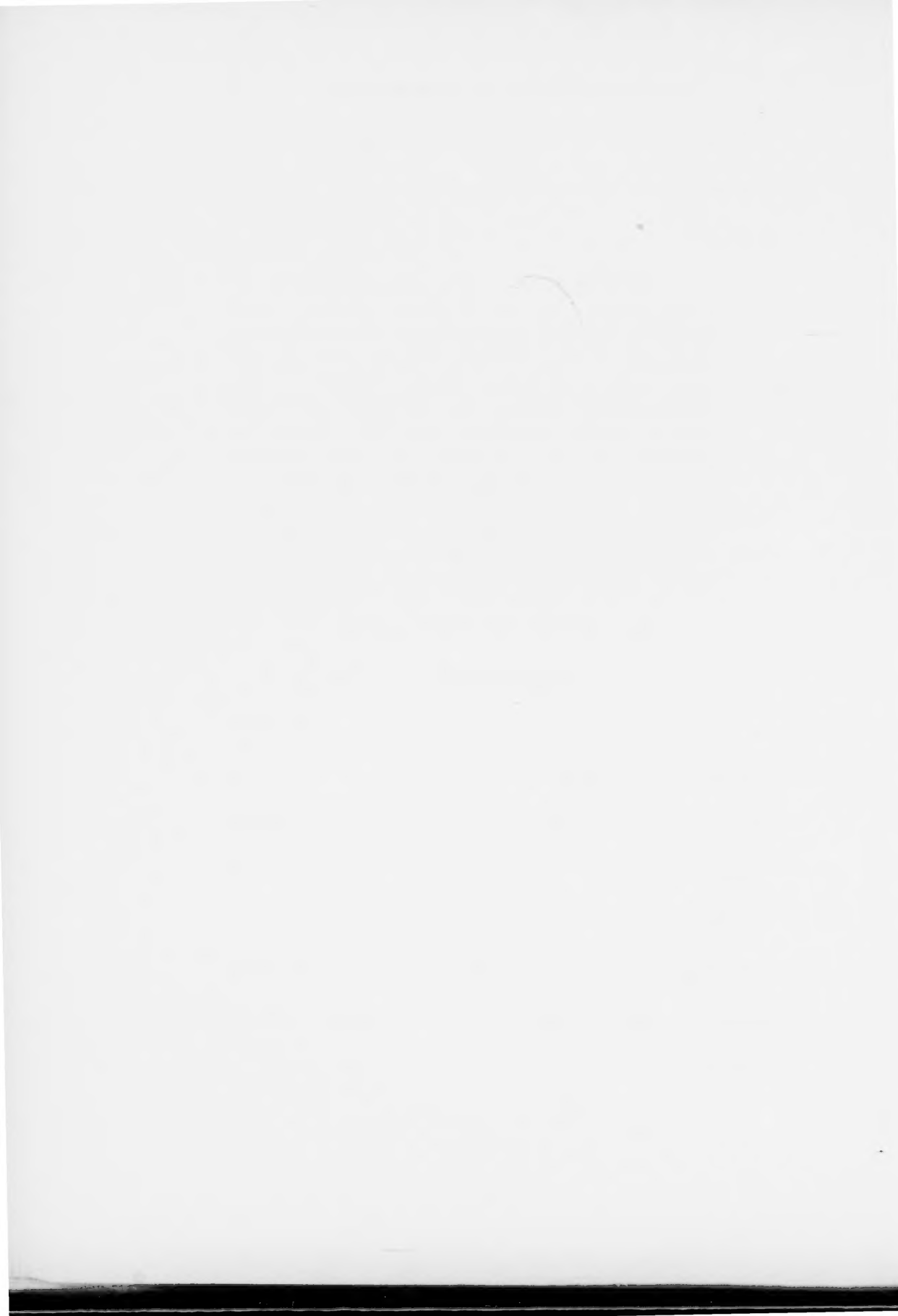
Section 1 of the 14th Amendment to the Constitution of the United States of America states:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

Respondent Dr. Ifeoma Ezekwo (hereafter "respondent") was a resident in the ophthalmology program at Harlem Hospital. She completed the program, is eligible to take the examinations for board certification, is licensed to practice ophthalmology, and has an ophthalmology practice.



In this action, petitioner alleged that she was wrongfully denied an opportunity to serve as chief resident for the four month period from November 1987 through February 1988. She alleged that she was denied the chief residency in retaliation for first amendment activity and that the denial of the chief residency was a deprivation of both liberty and property without due process of law.

After a bench trial, the District Court rejected all of her claims. On appeal, petitioner abandoned her liberty interest claim. The Second Circuit unanimously rejected respondent's first amendment claim and divided with respect to her deprivation of property without due process claim. The majority reversed the District Court with respect to this claim and the dissent said that plaintiff had no constitutionally protected property interest in the chief



residency, and, even if she did, she received due process.

Basis for Federal Jurisdiction

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1343 (3) and (4).

Statement of Facts

The Ophthalmology Residency Program at Harlem Hospital Center

The Ophthalmology Department of Harlem Hospital Center is run and staffed by the College of Physicians and Surgeons of Columbia University. Harlem Hospital is a unit of the New York City Health and Hospitals Corporation (HHC) and Columbia has a contract with HHC to operate the Department (JA147, JA492, JA503).¹ The

¹ Numbers in parentheses preceded by "JA" refer to the pages of the Joint Appendix that was filed in the Second Circuit. Numbers in parentheses preceded by "A" refer to the pages of the Appendix that accompanies this Petition.



residency program is three years long and has nine residents, three in each year of training (JA483, JA492, JA503). Residents learn to diagnose and treat eye disorders through lectures and the treatment of patients under the supervision of attending physicians (JA195-197, JA492-496, JA503-504). Attending physicians are board certified ophthalmologists (JA197).

Dr. Farris was chief of the department, Dr. Jordan was in charge of the attending physicians, and Dr. Delerme was in charge of the residents (JA151-152).

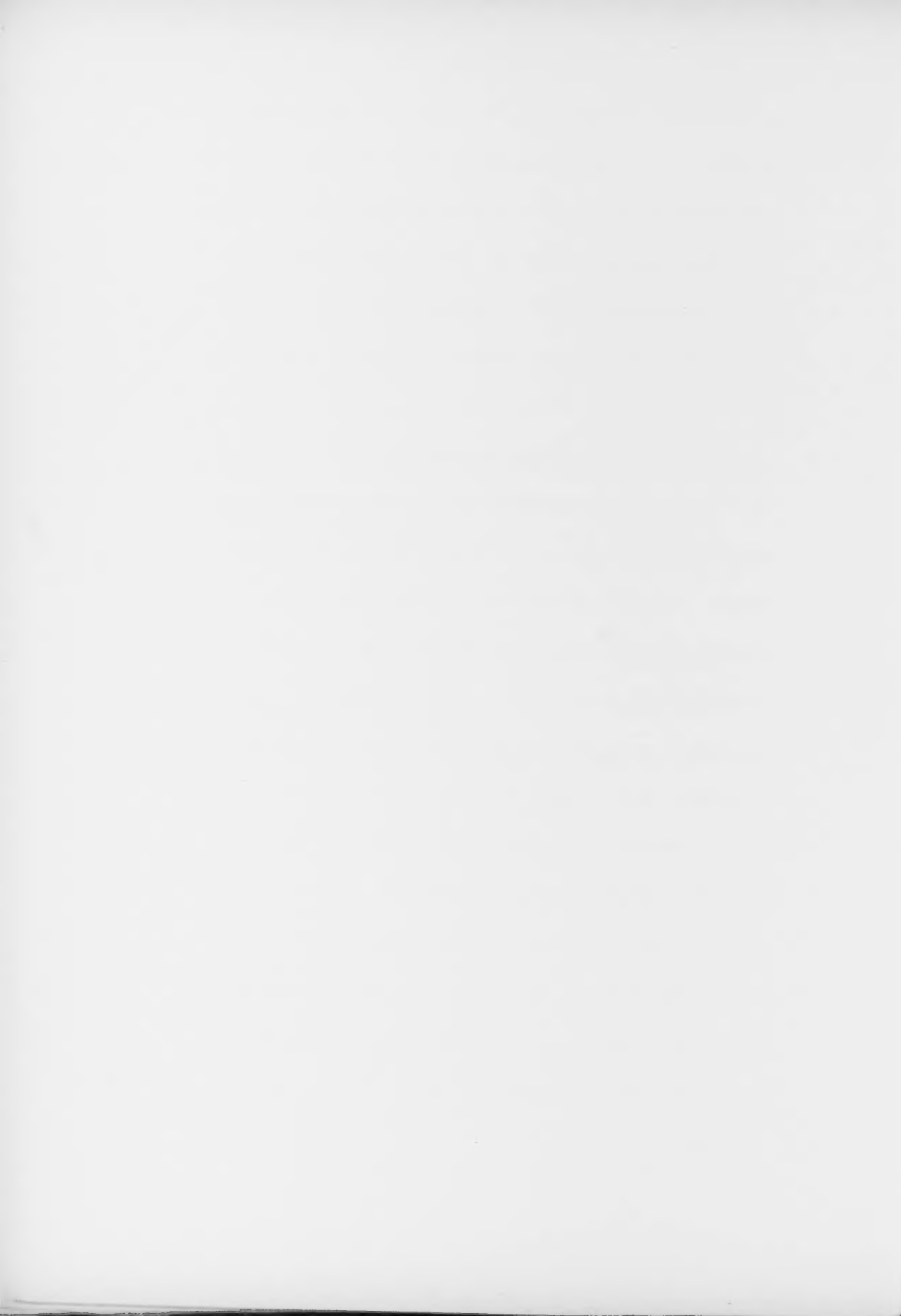
Respondent Joins the Ophthalmology Department of Harlem Hospital Center

Respondent commenced her residency in July 1985 (JA31, JA40). She was accepted after applying twice (JA31, JA37, JA449). The entering class that she joined consisted of herself, Dr. Solomon and Dr. Castillo (JA40). Her first application was rejected (JA28, JA201). Dr. Farris helped respondent to get accepted after her second

application (JA31, JA38, JA148, JA202-203, JA204). Dr. Farris was aware that respondent had had interpersonal problems in other departments of the hospital, but he was optimistic that these problems would diminish when she began training in the specialty of her choice (JA449).

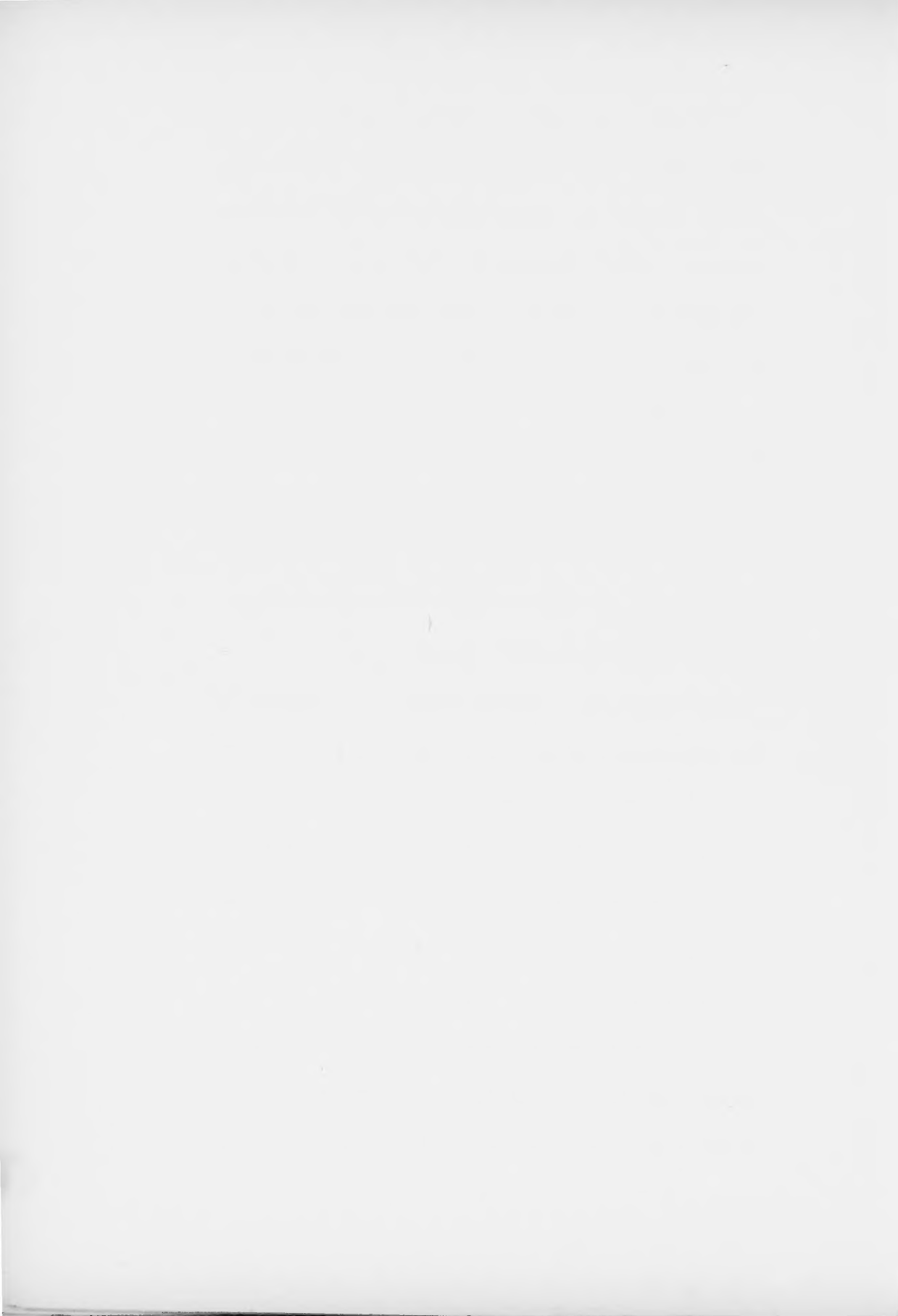
The Chief Residency

The chief resident helps other residents resolve problems involving patient care and helps resolve disputes among residents or between residents and attending physicians (JA199-200). The chief resident also presents patients at Friday morning rounds (JA199) and helps to organize conferences and lectures (JA200). Dr. Farris testified that the chief resident does not assign cases (JA198-199), but respondent testified otherwise (JA84, JA104). As chief resident for four months, respondent would have received an additional \$675.00 in salary (JA618).



From the early 1980's until October 1987, when respondent was about to become chief resident, each third year resident became chief resident for four months (JA150-151). This policy was set forth in brochures and the ophthalmology department's manual (JA150, JA492, JA503). None of the written contracts that governed respondent's relationship with Harlem Hospital guaranteed that she would become chief resident in her third year (JA102-103, JA609-665, JA753-756).

Respondent testified that she applied to the residency program at Harlem Hospital in part because it offered the opportunity to rotate as chief resident (JA120). Being a chief resident is not a prerequisite for licensure, or board certification (JA130). It is not a prerequisite for being accepted as a postgraduate fellow (JA312), but a hospital might consider whether an applicant was a chief resident along with one's other



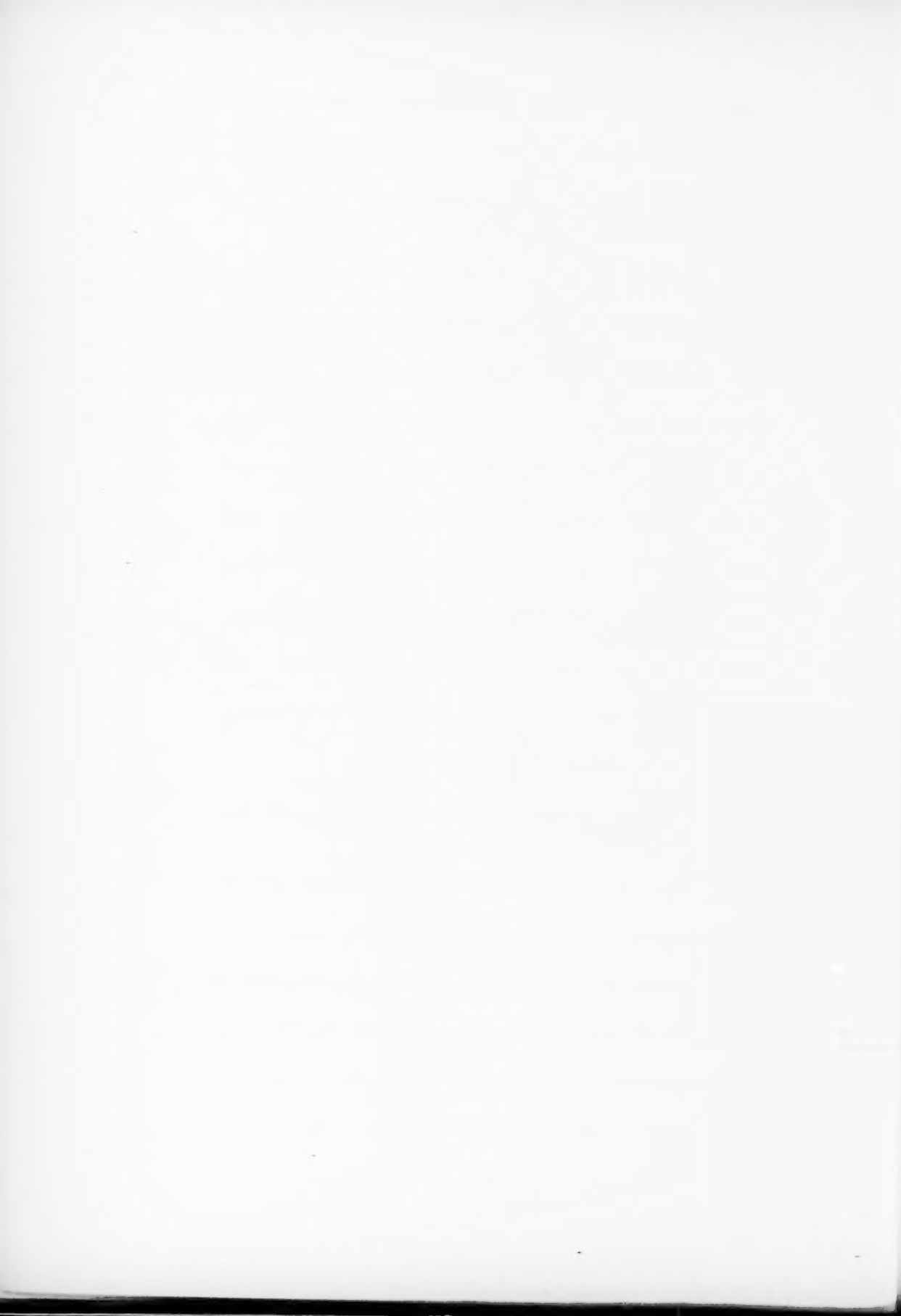
qualifications when deciding whether to accept the applicant as a fellow (JA260).

Plaintiff's Written Complaints and Memoranda Prior to October 16, 1987

During the period between the commencement of respondent's residency and the announcement that she would not be chief resident, respondent wrote a series of memoranda that attacked the personal and professional integrity of her teachers and fellow residents. She accused her teachers and fellow residents of being lazy, incompetent, and unconcerned about the welfare of their patients (JA405, JA410-421, JA444-446, JA469-481, JA580).

The Decision Regarding Respondent and the Chief Residency

Dr. Farris testified that he first began considering changing the chief residency system and going from a rotational system to a selection process in April, 1987 because of problems he was having with Dr. Seward, who was chief resident at the time



(JA221-222). Dr. Farris testified that in June or July of 1987, he, Dr. Delerme and Dr. Jordan discussed the possibility of not making respondent chief resident (JA178).

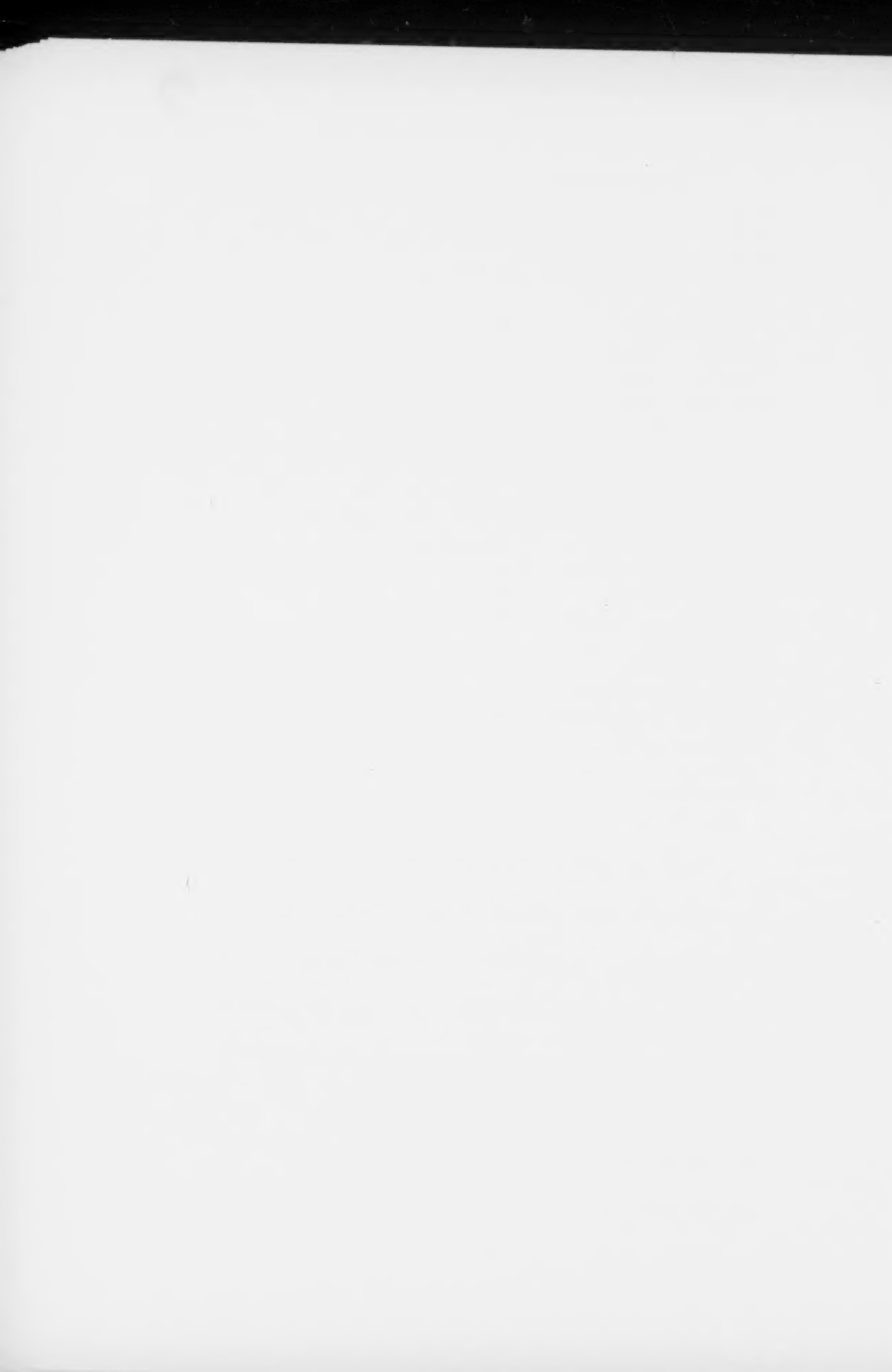
Junior residents were evaluated by senior residents and attending physicians JA(212-213). A resident's official evaluation was the evaluation that Dr. Farris signed (JA250). When evaluating a resident, Dr. Farris took into account his own observations and the evaluations of others (JA255). Respondent and Dr. Solomon were each evaluated by Dr. Farris and Dr. Delerme on June 19, 1987. The evaluations were done on a scale of 1 to 9. 1 to 3 was unsatisfactory, 4 to 6 was satisfactory, and 7 to 9 was superior. Respondent received an overall rating of 5.5 and Dr. Solomon received an overall rating of 6.5 (JA553, JA805). They received the following ratings in the following subcategories (JA550-553, JA802-805):



<u>Respondent</u>	
<u>Category</u>	<u>Score</u>
Medical Knowledge	6
Medical History	7
Examination Skills	6
Ophthalmic	
Procedures	5
Medical Judgment	6
Surgical Judgment	5
Surgical Skills	3
Personal Qualities	5
Attitudinal	
Qualities	5

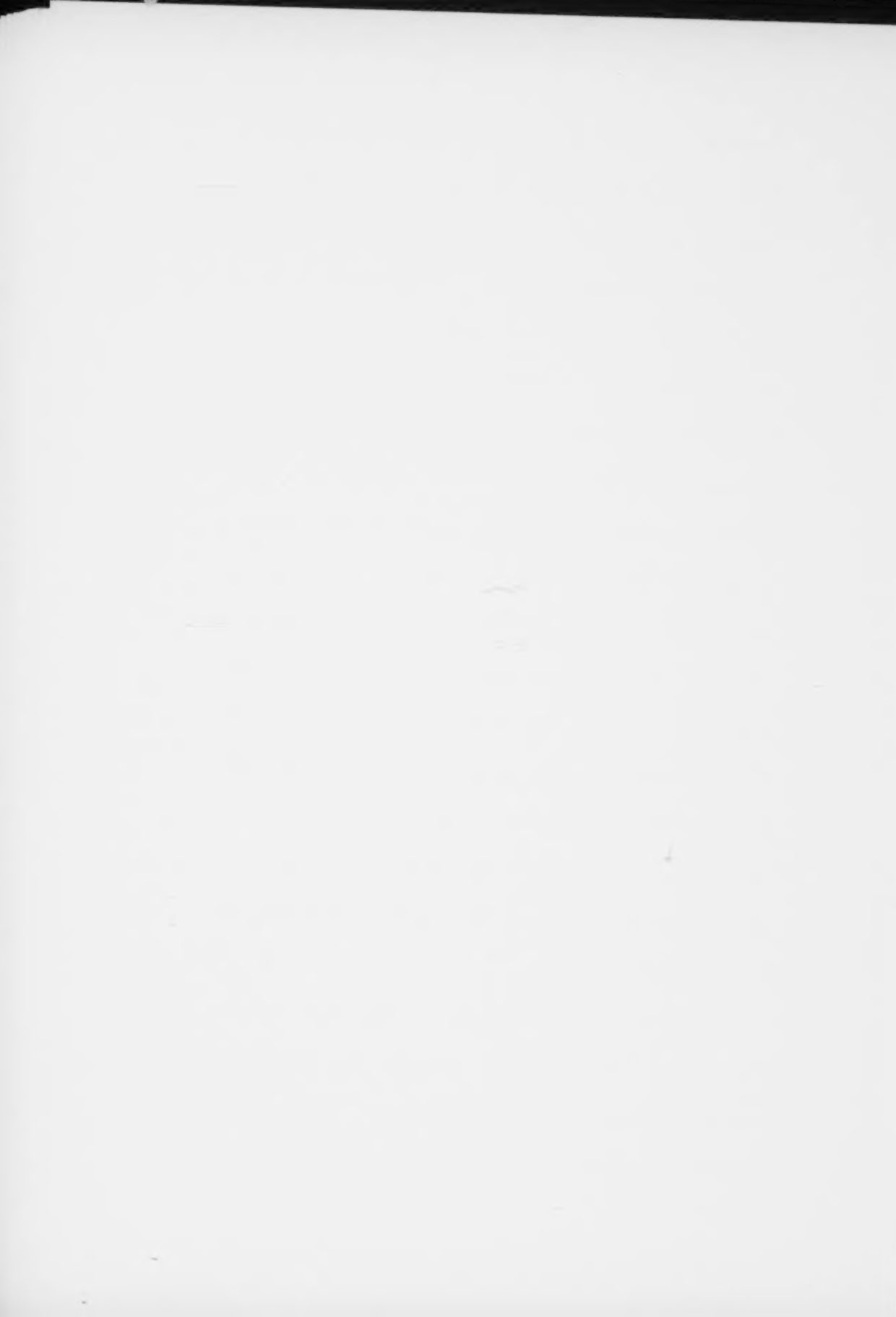
<u>Dr. Solomon</u>	
<u>Category</u>	<u>Score</u>
Medical Knowledge	5
Medical History	6
Examination Skills	7
Ophthalmic	
Procedures	6
Medical Judgment	5
Surgical Judgment	6
Surgical Skills	7
Personal Qualities	7
Attitudinal	
Qualities	8

The American Academy of Ophthalmology administers the OKAP examination (JA205). It tests residents' knowledge of ophthalmology (JA206-207). A resident's performance on the examination is compared with the performance of other residents with the same amount of training throughout the United States who took the same examination



(JA207). One is not required to obtain a minimum OKAP score in order to graduate from a residency program (JA79). Harlem Hospital ophthalmology residents have historically not done well on the OKAP examination (JA79-80, JA164-165). Respondent took the examination in the spring of 1986 and in the spring of 1987 (JA78). Her performance was in the lowest 1 percentile in 1986 and the lowest 6 percentile in 1987 (JA757-758). This means that 99% of the first year residents who took the exam in 1986 did better than she and 94% of the second year residents who took the exam did better in 1987 (JA207). In contrast, Dr. Solomon was in the 47 percentile in 1986 and in the 39 percentile in 1987 (JA757-758).

Every six weeks, the attendings would meet and discuss the residents (JA220). During these meetings, several attendings complained about respondent. They stated



that her surgical ability was inferior to that of the other residents and that she disagreed and argued with what they were trying to teach her (JA219). She would not do as she was told during surgery and, when a procedure was not going well, she would resist when the supervising attending would try to take over. Dr. Moazed testified that respondent had poor surgery skills and that respondent was not made chief resident because of her poor relations with others, her surgical skills, and her OKAP scores (JA306-308, JA331).

Several attending physicians wrote memoranda to Dr. Farris that were highly critical of respondent's surgical skills, medical knowledge, attitude, and her inability to get along with others (JA482, JA775, JA776-780, JA781-784).

In August or September of 1987, the attending physicians met and discussed whether respondent should succeed



Dr. Solomon as chief resident. The final decision rested with Dr. Farris, but the consensus was that Dr. Solomon should continue as chief resident (JA164-JA168, JA222). The attending physicians liked Dr. Solomon. He had good OKAP scores, good evaluations, and he got along with others well (JA222, JA331).

On October 16, 1987, Dr. Farris attended a meeting with the dean of the affiliation, the director of personnel for Columbia, and Dr. Delerme, Dr. Gonzalez, Dr. Bansal, and Dr. Tiwari. They were concerned with respondent's lack of surgical and interpersonal skills. They discussed dropping her from the program and not making her chief resident (JA176-JA178). Plaintiff's memoranda complaining about the program were discussed at this meeting (JA185, JA226). Dr. Farris was troubled by these memoranda because they contained such vicious personal attacks on the



attending physicians. In Dr. Farris' view, respondent stretched the truth and did not know the difference between an honest difference of opinion and malpractice (JA227). Dr. Farris testified that respondent's attacks on her colleagues had a deleterious effect on the collegiality of the department (JA229-230).

The decision to go from a rotational system of choosing residents to a selection process based on merit was announced in a memorandum dated October 16, 1987 (JA459).

This memorandum states (JA459):

Emmanuel R. Solomon has accepted the appointment of Chief Resident in the Department of Ophthalmology to continue during the next four month resident rotation, November 1987 thru February 1988. His appointment represents a change in the previous practice of having every resident in Ophthalmology serve as Chief Resident for a four month rotation. We anticipate this change to improve the residency program as a result of the Chief Resident being selected on the basis of residency training evaluation, test scores and ability demonstrated in administration and leadership.

Dr. Farris testified about the relevance of the selection factors mentioned in the memorandum. OKAP test scores indicate the degree to which a resident has mastered the "book knowledge" of ophthalmology, and evaluations indicated the degree to which the practical skills of examination and surgery have been mastered (JA229). Dr. Farris said that the chief resident should excel or at least be above average in these areas so that he or she can serve as a model for the other residents (JA229). Dr. Farris said that a resident should have good leadership skills so that he can resolve conflicts among the residents and persuade them to accept department policies (JA229). Dr. Farris said that a chief resident should be able to get along with the attending physicians and residents in order to minimize personal conflicts that might get in the way of patient care and educational goals (JA200-201).



Respondent testified that, in June of 1987, she was told that she would be chief resident from October 1987 through February 1988 (JA74, JA187). Respondent said that she did not learn that she would not be chief resident until the end of October, 1987 (JA99-102, JA183).

Dr. Castillo was also not made chief resident. Dr. Moazed testified that this was because Dr. Castillo was chronically late for clinics and lectures (JA329-330).

Events Following Plaintiff's Graduation from the Residency Program

Respondent graduated from the residency program in June, 1988 (JA110, JA122). Upon graduation, respondent received a letter from Dr. Farris stating that she completed the program. This letter qualifies her to take the examinations for Board certification (JA129-130). She is not board certified because she has not taken the examinations (JA131).



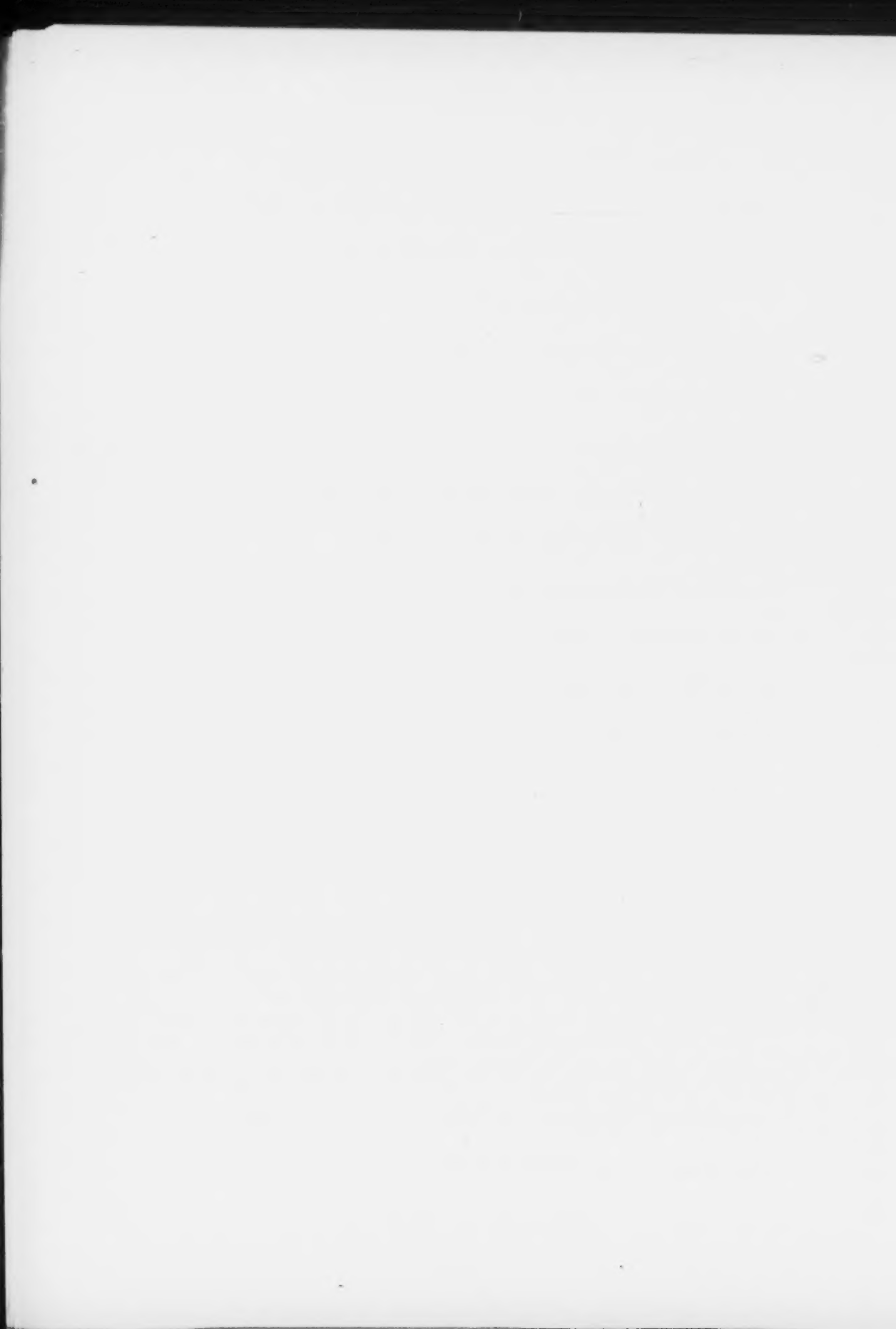
Since 1984, she has maintained a medical practice at an office located at 2685 Grand Concourse. Her practice started as an internal medicine practice. In 1988, she added ophthalmology to her practice (JA27). She is licensed to practice ophthalmology (JA130).

Respondent has had difficulty in obtaining post graduate fellowships and admitting privileges at hospitals, but there is no evidence that these difficulties can be attributed to the fact that she was not appointed chief resident (JA110-111, JA125, JA314, JA341-343, JA670, JA681, JA709).

Decisions Below

Decision of the District Court

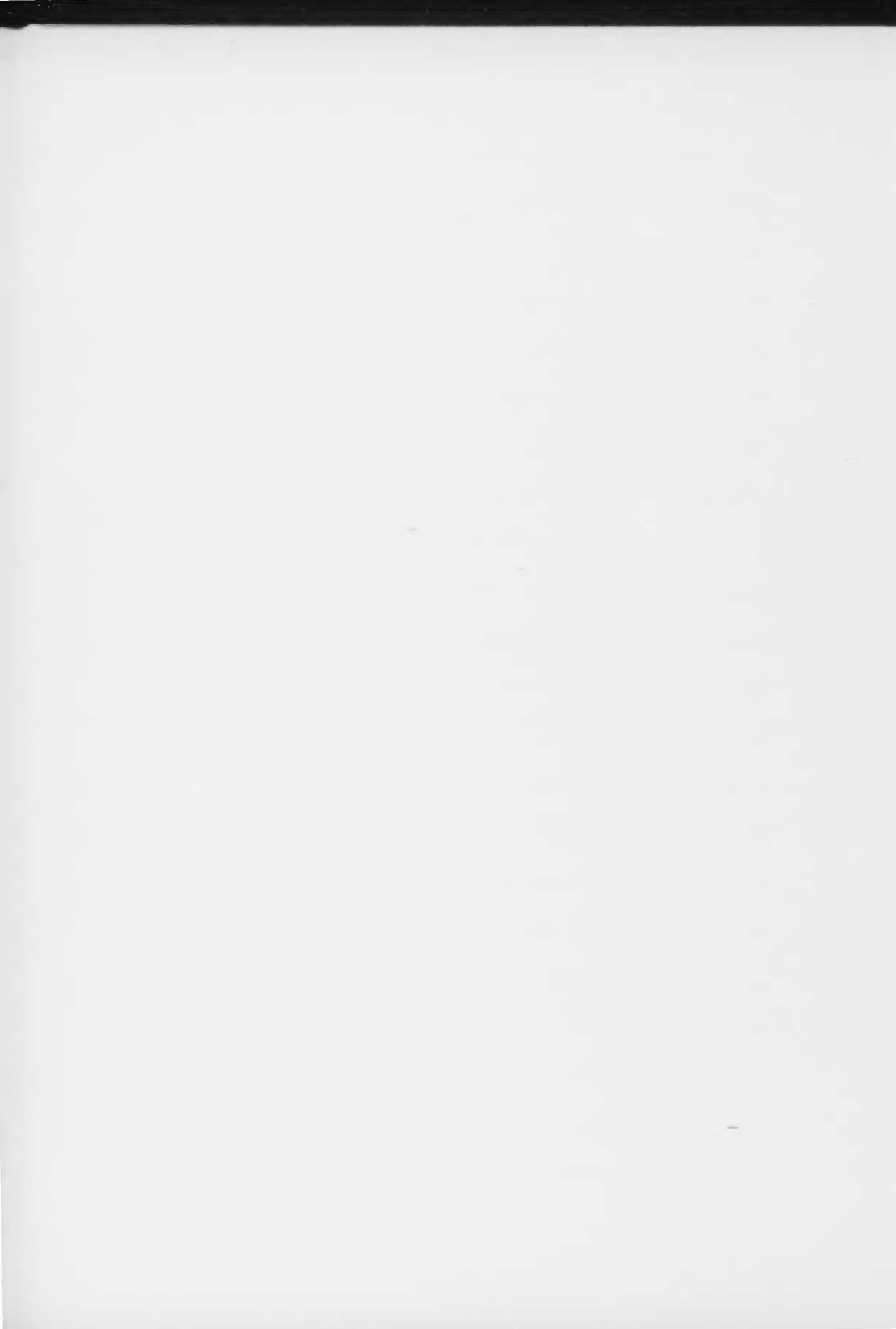
The District Court stated that respondent alleged that the decision to not make her chief resident gave her three causes of action. The Court said that respondent alleged the following: (a) She was denied the chief residency in retaliation



for her complaints against the residency program in violation of the her first amendment rights. (b) The denial of the chief residency deprived her of property without due process. (c) The denial of the chief residency deprived her of liberty without due process (A3-4). The Court addressed each claim in turn.

The Court held that respondent did not demonstrate a valid first amendment claim because her complaints did not constitute expression protected by the first amendment because they were overwhelmingly personal grievances and personal attacks on other individuals rather than remarks aimed at broad public concerns (A4-6). The Court also found that "the action by Dr. Farris was not motivated by [respondent's] complaints" (A6).

The Court held that respondent did have a constitutionally protected property interest in being appointed chief resident,



even though the contracts she signed made no reference to chief residency, because the brochure that the program issued referred to a rotation as a chief resident, and therefore, respondent had more than a unilateral expectation of becoming chief resident (A7-8). However, the Court found that respondent was not deprived of property without due process because she received due process. The Court found that the determination to not make her chief resident was based on deficiencies in her performance as a resident, primarily in the area of interpersonal relationships and her low OKAP scores. Therefore, the decision was academic and not disciplinary in nature and respondent was not entitled to a formal notice or hearing (A8-10).

The Court found that the decision to not make respondent chief resident did not deprive her of a constitutionally protected liberty interest. It found that the decision

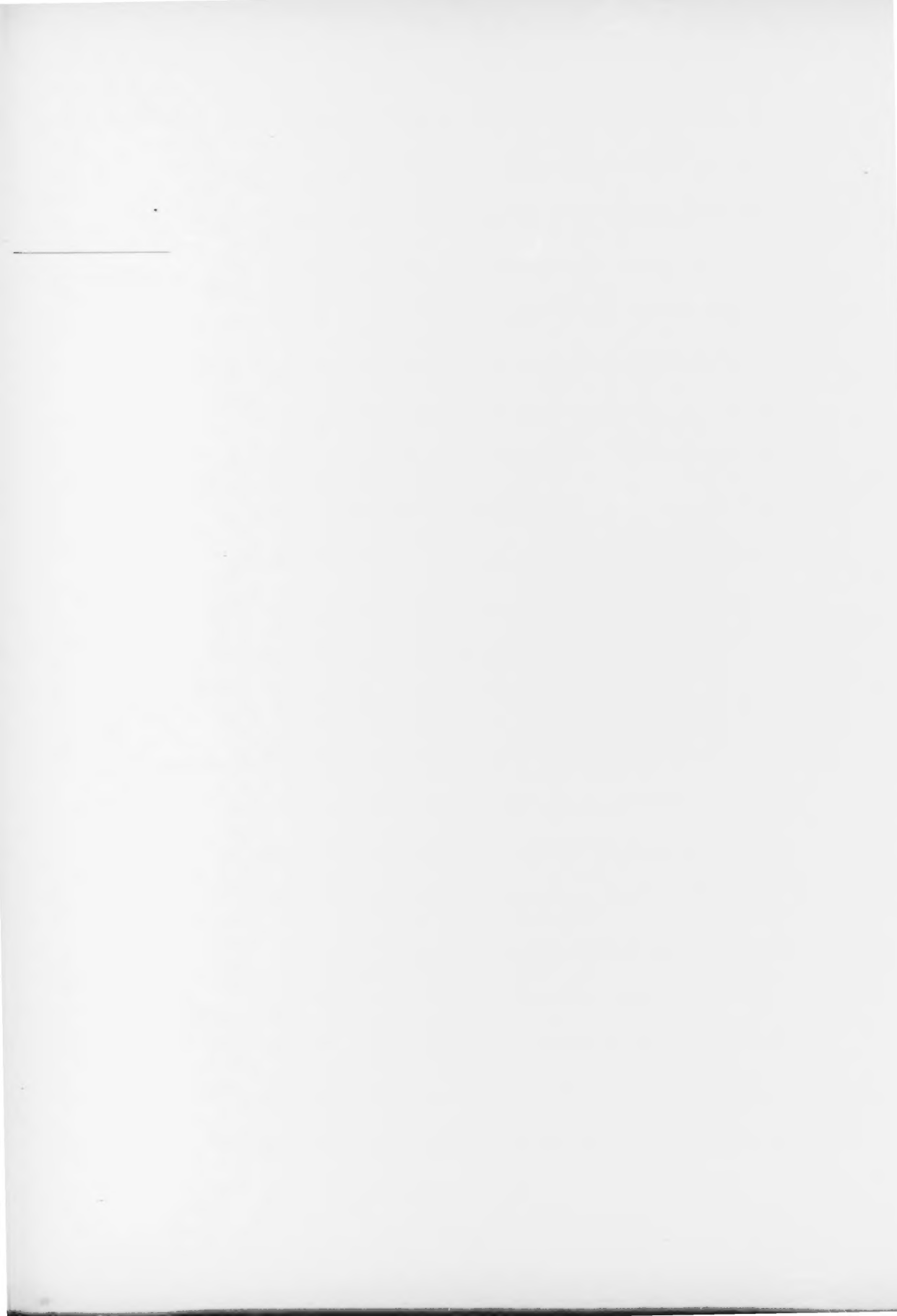
to not make respondent chief resident did not implicate a liberty interest because it did not stigmatize her or make it impossible for her to gain employment in the future. It found that the chief resident position is purely administrative and that, while having been a chief resident may enhance one's opportunities somewhat, the failure to have served as chief resident does not impugn one's abilities as a physician or foreclose job opportunities (A10-11).

Decision of the Circuit Court

The Majority

After summarizing the facts (A16-32), and affirming the District Court's rejection of respondent's first amendment claim (A34-40), the majority proceeded to discuss her due process claim.

First the majority said that, although neither respondent's individual written contracts nor the collective bargaining agreement that covered respondent mentioned



any right to the chief residency, respondent had an implied contractual interest in becoming resident (A42-A43). The majority then acknowledged that not every contractual employment benefit is a constitutionally protected property right (A43-44), but said that respondent's right to be chief resident was not as trivial as those employment benefits which have been held to not be constitutionally protected (A45). The majority said that respondent's interest in the chief residency was more than merely financial (A47-48). ² It said that this

² The majority did not reconcile this statement with the following statement made later in its opinion (A59):

The only evidence of actual damage suffered by [respondent] as a result of the deprivation of [the chief residency] was the loss of the pay differential that accompanied the designation of Chief Respondent. On remand, therefore, the district court's damages inquiry should be limited to that amount.

(Footnote Continued)

designation is important because it denotes the culmination of years of study³ and is necessarily a position that an individual can occupy only once (A48).

Although bound by the District Court's finding that respondent was denied the chief residency for academic reasons under the "clearly erroneous" standard of review (A32-33), the majority expressed its skepticism with regard to this finding (A53). Nonetheless, the majority held that, even if the decision was academic in nature, respondent did not receive due process. The majority distinguished this Court's

(Footnote Continued)

As chief resident for four months (JA150-151), respondent would have earned an additional \$675.00 (JA618).

³ The majority did not explain why respondent's graduation from the residency program was not itself sufficient evidence of her years of study, where the chief residency was awarded on a rotational basis and not by merit, and hence, merely denoted that a resident had reached the third year of residency.

decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), on the grounds that in this case, respondent was denied the chief residency on the basis of new criteria for the position of chief resident. The majority said that respondent should have been informed in advance of the intention to change the criteria and should have been given the opportunity to argue that (a) the criteria should not be changed, or (b) that the criteria should not be changed until after she served as chief resident, as she had been promised, or (c) that she was qualified to serve as chief resident under the new criteria (JA56-57).

In remanding the case back to the District Court, the majority said that since the only evidence of actual damage suffered by the respondent was the loss of the pay differential that chief residents' received,

the District Court's damages inquiry should be limited to calculating that amount.

The Dissent

The dissent began by saying that although the majority gave "lip-service" to the principle that it was bound by the factual findings of the District Court, the majority gave "short shrift" to the District Court's finding that the chief residency determination was academic rather than disciplinary, a finding which the dissent said was "solidly supported by the record" (A62-64).

Although respondent had an implied contractual interest in becoming chief resident, not every deprivation of a contractual employment benefit is a deprivation of property within the meaning of the due process clause (A67). The dissent cited several cases in support of the proposition that breaches of a public employment contract that do not involve a



loss of employment do not implicate the due process clause (A67-70). While respondent's interest in becoming chief resident in rotation for four months was not as trivial as an interest as taking one's vacation at a particular point in time, her interest in the chief residency was in no way comparable to a loss of employment (A74). Losses of employment benefits short of termination itself should not be considered deprivations of property because " '[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.' Bishop v. Wood, 426 U.S. 341, 349" (A74-75).

It was particularly inappropriate to find a property right in this case because of its academic context (A75). The dissent said that it was unwise to hold that a change in academic policy implicates students' property



interest, because such a holding impedes academic change (A76-77).

The dissent stated that, even if it agreed that respondent was deprived of a property interest, she had no federal claim because she was not denied due process. If respondent did have a property interest, it was a decidedly minor interest, and "in the wake of the Supreme Court's decision in Horowitz, supra, I think it is treading on thin ice to impose additional procedural requirements in the context of an academic decision such as this one" (A78-79). The dissent noted that in Horowitz, a student was dismissed from medical school, and therefore suffered a much greater deprivation than respondent did, but nonetheless this Court was reluctant to interfere in academic affairs and it stated that a formal hearing was inappropriate in the academic context (A79-82). The dissent rejected the majority's attempt to distinguish

Horowitz and said that although the student in Horowitz received more process than respondent, the deprivation in Horowitz was far greater (A82).

The dissent also noted that state law gave respondent a vehicle for challenging the denial of the chief residency in the form of an Article 78 proceeding or a contract action. Since, in this case, if a property interest was involved, it was a minimal interest at most, and therefore, a post-deprivation remedy would satisfy due process (A86). The dissent cited this Court's decision in Ingraham v. Wright, 430 U.S. 651 (1977), for the proposition that due process does not require a pre-deprivation hearing in every instance (A85-86).

Finally, the dissent stated that it agreed with the majority that it was unlikely that additional process would have changed the result here, and under this Court's

decision in Mathews v. Eldridge, 424 U.S. 319 (1976), this supported its view that additional process would only impose an unnecessary administrative burden.

REASONS FOR GRANTING THE WRIT

The majority decision in this case conflicts with decisions of the First, Third, Fifth, Sixth, Seventh, and Eleventh Circuits, insofar as the majority held that a public employee has been deprived of constitutionally protected property interest when that employee is denied a temporary four month promotion that would not have signified that the employee had any special merit and would have resulted in an earnings differential of \$675.00.

In addition, the majority decision conflicts with this Court's decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), and with decisions of the Third, Fifth, Sixth and Eighth Circuits, insofar as the majority held



that a medical resident is denied due process when she is denied a temporary four month promotion that would not have signified that she had any special merit and would have resulted in an earnings differential of \$675.00, when the denial is based on the resident's test scores, clinical performance and interpersonal behavior over a two year period, and the decision was carefully considered by the faculty of the residency program.

1. The majority decision conflicts with decisions of the First, Third, Fifth, and Sixth Circuits, insofar as the majority held that an employee has been denied a constitutionally protected property right when the employee has neither been discharged, nor permanently demoted, but has instead been denied a relatively minor benefit that consisted of an implied contractual promise to give the employee a four month rotation in a position that carried with it supervisory duties and a slight increase in pay.

The majority held that respondent had an implied contractual right to be chief resident for four months, and that this

implied contractual right was a constitutionally protected property interest. This holding is unsupported by the decisions of this Court and is contrary to the decisions of other federal courts.

As the dissent below noted, this Court has never recognized any property interest in the employment context other than an interest in employment itself (A70-71). Furthermore, many circuit and district courts have held that, although a contractual guarantee of employment tenure will give rise to a property interest in employment itself, contractual employment benefits other than tenure do not give rise to a property interest in those benefits. Dorsett v. Board of Trustees, 940 F.2d 121, 123 (5th Cir. 1991); Greenberg v. Kmetko, 840 F.2d 467, 475 (7th Cir. 1988); Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270, 272, n. 1 (6th Cir. 1985); Brown v. Brien, 722 F.2d 360, 364-365, 360 (7th

Cir. 1983); Casey v. DePetrillo, 697 F.2d 22, 23 (2d Cir. 1983); Bleeker v. Dukakis, 665 F.2d 401, 403 (1st Cir. 1981); Farkas v. Ross-Lee, 727 F. Supp. 1098, 1103-1105 (W.D. Mich. 1989), aff'd without op'n, 891 F.2d 290 (6th Cir. 1989); Rode v. Dellarciprete, 646 F. Supp. 876, 880 (M.D. Pa. 1986), rev'd in part on other grounds, 845 F.2d 1195 (3d Cir. 1988). If this were not so, then federal courts would become enmeshed in every trivial dispute that can arise in the public employment arena. Kmetko, supra, 840 F.2d at 475; Brown, supra, 722 F.2d at 365.

The majority below paid lip service to the foregoing precedents (A43-44), but then proceeded to ignore them. It held that respondent's interest in becoming chief resident in rotation for four months was a constitutionally protected property interest, but it did not adequately explain why this was so in light of the fact that, by the

majority's own account, the only "actual damage" that respondent proved was the pay differential that respondent would have received as chief resident (A59), which the record shows was a total of \$675.00 (JA150-155, JA618).

Much of the majority's discussion of the importance of respondent's interest in the chief residency did not establish its importance at all. The majority took great pains to establish the reasonableness of respondent's expectation that she would become chief resident (A46-47). This discussion, however, only establishes that respondent had an implied contractual interest in the position. It does not establish that this interest was so substantial that an ordinary contract action in state court was not adequate for its protection and, instead, it warranted constitutional protection.



The majority said that the chief residency was of special importance because it denoted the culmination of years of study (A48). However, respondent's graduation from the residency program itself denoted the culmination of years of study. To the extent that she wanted the chief residency for this purpose, the chief residency was redundant. To be sure, if the chief residency were awarded on the basis of merit, it would denote more than mere years of study, but the alleged property right at issue here is the right to be chief resident in rotation, regardless of merit.

Respondent completed the residency program, is eligible for board certification, is licensed to practice ophthalmology, and is in fact practicing this medical specialty (JA27, JA110, JA122, JA129-131). As the majority held, respondent did not show that she was damaged by the failure to make her chief resident beyond the loss of the salary

differential (A59). Therefore, there is no basis for the majority's statement that the interest at stake was "of significant professional value."

Aside from losing \$675.00, all that respondent lost as a result of not being made chief resident was the opportunity to discharge some supervisory duties for a four month period. The Third and Eleventh Circuits and two District Courts have held that contractual interests that were more important than the chief residency here were not constitutionally protected property interests.

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), this Court noted that depriving a person of a job is a particularly severe deprivation, because a discharged employee has been separated from his livelihood, and may have difficulty in finding new employment. Id. at 543. In this case, respondent has not been cut off



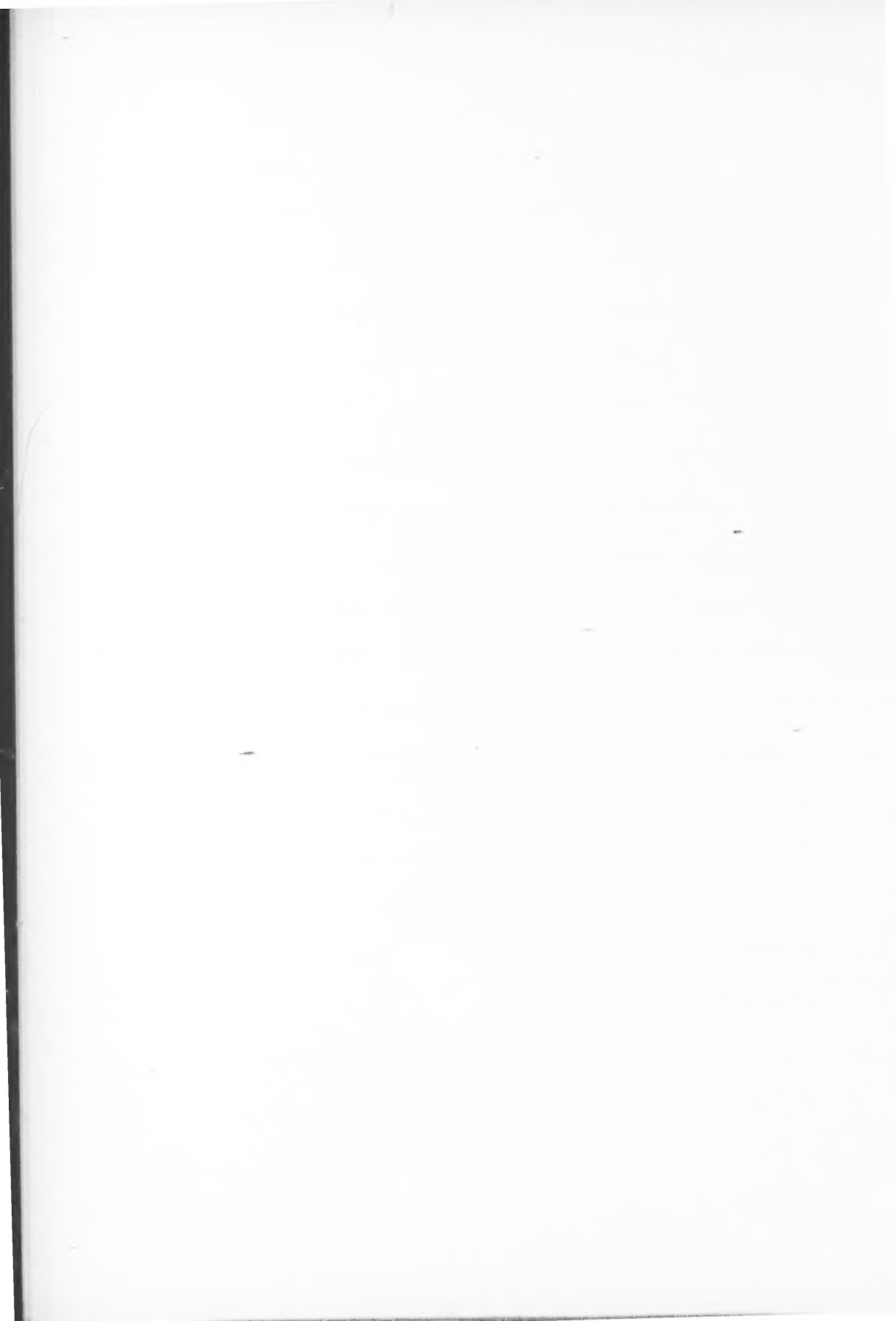
from her means of livelihood. On the contrary, she graduated from the residency program and went on to an active ophthalmology practice.

In Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), Justice Powell, in a concurring opinion, stated that a student's claim that his contractual right to remain in a six year university program leading to a joint undergraduate and medical degree gave him a property right was "dubious at best". Id. at 229. If the claim that remaining in a degree program is a property right is "dubious at best", it then follows that respondent's claim to a property right is utterly baseless, since she was allowed to complete her residency and was only denied a short stint as chief resident.

In Unger v. National Residents Matching Program, 928 F.2d 1392 (3d Cir. 1991), a physician had applied to Temple

University Hospital in order to be accepted as a resident in dermatology. She was accepted for a residency which was to begin in July, 1989. Temple discontinued its residency program in dermatology before the physician began her residency and it was impossible for the physician to gain acceptance in another residency program that would commence in 1989. The Court held that the physician's contractual right to commence her residency at Temple was not a protected property right. Id. at 1399. The plaintiff in Unger had to postpone her training and career as a dermatologist for one year. Respondent herein did not have to postpone her career plans for one minute. If the plaintiff in Unger did not have a property interest, then surely respondent does not.

In Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991), the Court stated that a physician has not been



deprived of a property right when the physician has been denied hospital staff privileges if the denial has not seriously limited the ability of the physician to engage in private practice. Id. at 1464. The Court applied this principle to deny the due process claim of a neurologist who wanted radiology privileges at a hospital in order to further his neurology practice. Id. Here, there is no evidence that the denial of the chief residency has seriously limited respondent's ability to practice ophthalmology.

In Faucher v. Rodziewicz, 891 F.2d 864 (11th Cir. 1990), a change in hospital procedures had the practical effect of reducing the volume of work that went to an anesthesiologist who had been practicing at the hospital for years. The Court, in rejecting the anesthesiologist's due process claim, said, "[W]e do not wish to transform the economic value of medical staff privileges

into a protected property interest." Id. at 869 (emphasis in original) (footnote omitted). Here, there is no evidence that the economic value of respondent's ophthalmology practice has been diminished in any way by the denial of the chief residency.

In Warfield v. Adams, 582 F. Supp. 111 (S.D. Ind. 1984), the Court held that an elementary school principal who is demoted to the position of first grade teacher is not deprived of a property right even if she had a contract as principal because she has not been discharged from employment and is free to pursue her contractual claims in state court. Respondent's interest here is clearly less significant than the interest of the principal in Warfield.

In Rode v. Dellarciprete, 646 F. Supp. 876 (M.D. Pa. 1986), rev'd in part on other grounds, 845 F2d 1195 (3d Cir. 1988), the Court held that the plaintiff did not allege a deprivation of a property right when she

alleged that she had been transferred to a new department, been assigned demeaning tasks, been deprived of training, been made the subject of derogatory remarks, and been deprived of her office and filing cabinet. Id. at 880. Surely, the cumulative effect of the above actions would have more impact than the denial of the chief residency had on respondent.

Finally, we wish to note that the majority's willingness to find a property right here despite the insubstantial nature of the interest involved is particularly disturbing because the decision to deny respondent the chief residency was an academic decision. "[T]his case arises in an academic context where judicial intervention in any form should be undertaken only with great reluctance." Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988), cert. denied, ___ U.S. ___, 110 S. Ct. 53 (1989); see, Regents of the

University of Michigan v. Ewing, 474 U.S. 214, 226 (1985); Dorsett v. Board of Trustees, 940 F.2d 121, 123 (5th Cir. 1991).

2. The majority decision conflicts with this Court's decision in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), and with decisions of the Third, Fifth, Sixth and Eighth Circuits, insofar as the majority held that the careful evaluation of respondent's test scores and performance as a resident, which preceded the academic decision to not make her chief resident, did not satisfy due process.

Even if it is assumed, arguendo, that respondent did have a property interest, then the decision of the majority is still incorrect because respondent received all of the process that was due her.

The District Court found that the respondent was denied the chief residency out of academic concerns rather than for punitive reasons (A9). This finding was well supported in the record (JA164-168, JA176-178, JA185, JA200-201, JA219, JA220,

JA222, JA226-231, JA306-308, JA323-324, JA331).

In Board of Curators, this Court held that a medical student who was dismissed from a public university was not denied due process even though she did not receive a traditional hearing. The faculty of the medical school was not satisfied with the student's performance. Id. at 81. Before dismissing her, the faculty "tested" her by having her work with seven area physicians. Two recommended graduation, two recommended dismissal and three recommended probation. Id. at 81. The university decided to dismiss the student, and adhered to its decision after the student appealed in writing. Id. at 82. Assuming, without deciding, that the student had a constitutionally protected property or liberty interest, this Court decided that she had been afforded as much due process as the constitution required. Id. at 84-85. This



Court distinguished its prior decision of Goss v. Lopez, 419 U.S. 565 (1975), on the grounds that Goss involved a disciplinary suspension for a specific wrongful act. Id. at 85-86. It held that a hearing during which a student can present his side of the issue is not required when an academic determination is being made because such a determination is subjective, cumulative, and evaluative. Id. at 89-90. In a footnote, it was noted that, in the case of a medical student, the fact that the university's decision may turn on elements of personal behavior, such as hygiene or punctuality, do not make it any less academic. Id. at 91, n. 6.

The principles that this Court enunciated in Board of Curators have been applied by several federal courts. Hankins v. Temple University, 829 F.2d 437 (3d Cir. 1987) (informal evaluation procedure satisfies due process when physician is terminated

from fellowship program at university hospital); Mauriello v. University of Medicine and Dentistry of New Jersey, 781 F.2d 46 (3d Cir. 1986), cert. denied, 479 U.S. 818 (1986) (informal academic evaluations of a graduate student's work satisfy due process when student is dismissed from graduate program); Miller v. Hamline University School of Law, 601 F.2d 970 (8th Cir. 1979) (student who has been dismissed from law school for academic reasons has no right to appear before the board that considered and denied his application for readmission); Mohammed v. Mathog, 635 F. Supp. 748 (E.D. Mich. 1986), (physician who is dismissed from residency program has no right to be present at meeting at which faculty decided to dismiss him for academic reasons).

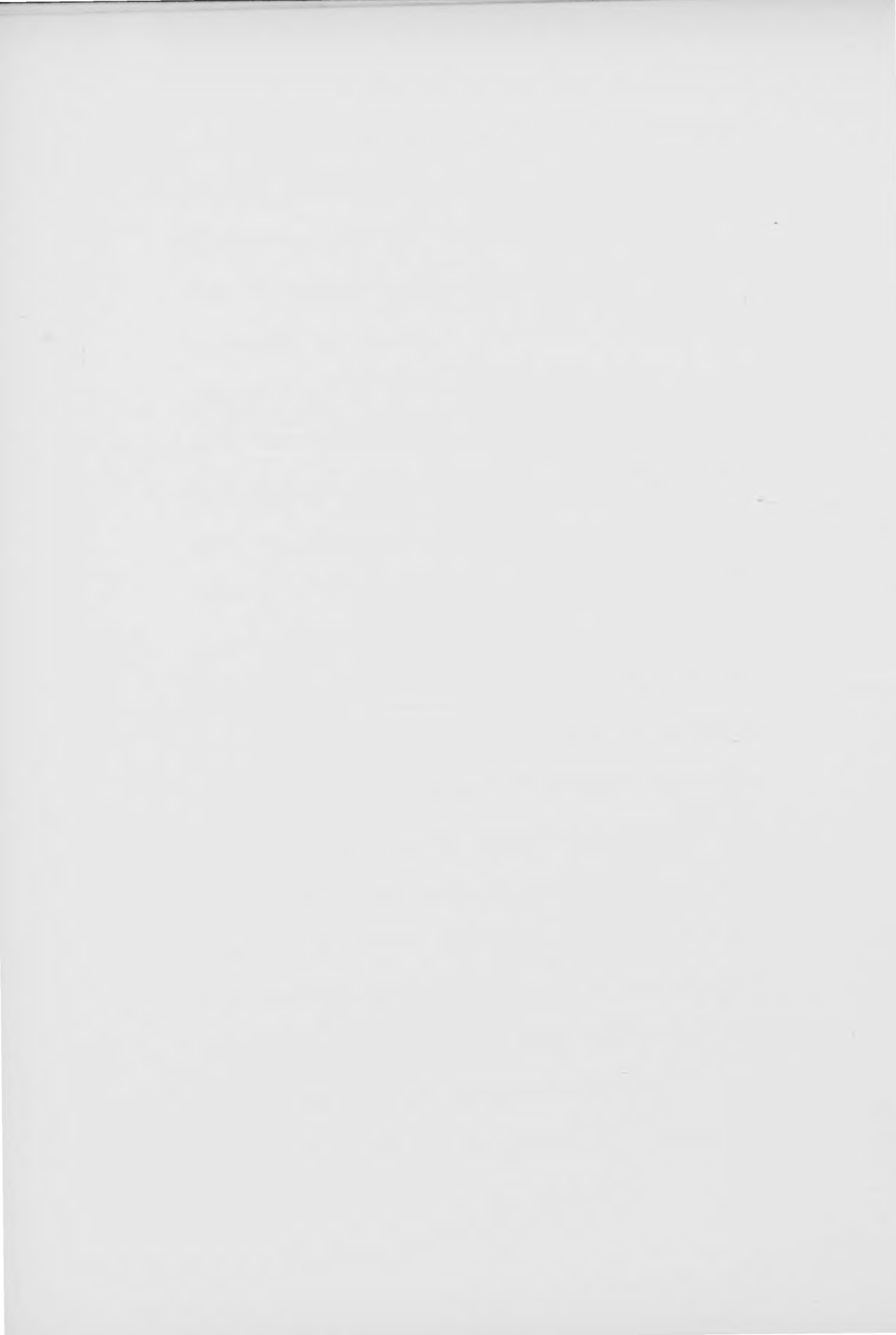
The majority's holding that the respondent herein was denied due process is inconsistent with Board of Curators and its

progeny. The decision regarding respondent was a cumulative one which took into account her OKAP score, her evaluations, and the views of the attending physicians who were her teachers.

It is true that the students in Board of Curators and the other cases cited above received more elaborate process than respondent did. However, respondent had a lot less at stake than those students. Respondent was not dismissed from the program and has gone on to pursue her chosen medical specialty. As this Court noted in Board of Curators, the severity of the deprivation is one of the factors to be considered when deciding what kind of procedure due process requires. Id. at 86, n.3, citing, Mathews v. Eldridge, 424 U.S. 319 (1976). Consequently, our discussion supra, at pages 34-35, concerning the unimportance of respondent's interest in the chief residency, is related to determining

whether she got due process. Brown v. Brien, 722 F.2d 360, 365 (7th Cir. 1983).

Due process does not not necessarily require a pre-deprivation hearing in each and every situation. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, n. 7 (1985); Ingraham v. Wright, 430 U.S. 651 (1977); Chernin v. Welchans, 844 F.2d 322, 326 (6th Cir. 1988); Augustine v. Doe, 740 F.2d 322, 328, n. 8 (5th Cir. 1984). Two Circuit Courts have held that, when a person has an interest that only minimally qualifies as a property interest, due process does not require a pre-deprivation hearing, and a post-deprivation hearing will suffice. Ramsey v. Board of Education of Whitley County, 844 F.2d 1268 (6th Cir. 1988) (school teacher whose sick leave balance was reduced from 142 to 29 days was not deprived of due process because she could challenge this action in a state breach of



contract action);⁴ Boucvalt v. Board of Commissioners, 798 F.2d 722, 730 (5th Cir. 1986) (physician whose contract to provide anesthesiology services at a hospital was terminated was not denied due process because he could challenge the termination in a contract action).

Here, assuming arguendo that respondent (1) had a property interest, and (2) was entitled to some kind of pre-deprivation hearing, the evaluation that preceded the denial of the chief residency satisfied due process because of the academic nature of the decision and the relative lack of importance of the interest involved. However, even if this hearing was, by itself, not sufficient, the entire panoply of process available to petitioner was sufficient

⁴ A loss of 113 sick days is a greater pecuniary loss than is a loss of \$675.00, the amount lost by respondent as a result of not being made chief resident.

to satisfy due process. Petitioner could have challenged the determination regarding the chief residency in a state contract action or in a proceeding brought under Article 78 of the New York State Civil Practice Law and Rules. In determining whether the pre-deprivation procedures which are followed before a person is deprived of liberty or property satisfy due process, one must consider the availability of post-deprivation remedies. Where a pre-deprivation hearing is required, a post-deprivation hearing, by itself, will not satisfy due process, but the availability of a post-deprivation hearing will insure the constitutionality of an informal pre-deprivation hearing. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545, 546-548 (1985); Ingraham v. Wright, 430 U.S. 651, 678, n. 46 (1977); Matthews v. Eldridge, 424 U.S. 319, 339, 343 (1976); Williams v. Wallis, 734 F.2d 1434 (11th Cir.

1984); D'Acquisto v. Washington, 640 F.
Supp. 594, 614-615 (N.D. Ill. 1986).

CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of
the City of New York,
Attorney for Petitioners.

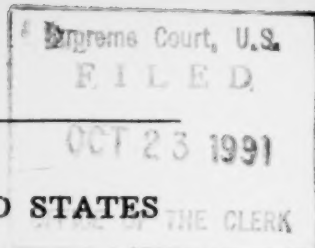
LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
FRED KOLIKOFF,
of Counsel.

October 25, 1991

*Counsel of Record

91-872
2

No. 91-



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION;
HARLEM HOSPITAL CENTER;
COLUMBIA UNIVERSITY
COLLEGE OF PHYSICIANS
AND SURGEONS; and
DR. R. LINSY FARRIS,

Petitioners,

-against-

DR. IFEOMA EZEKWO,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND
CIRCUIT

O. PETER SHERWOOD,
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(212) 788-1030 or 1067

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
FRED KOLIKOFF,
of Counsel.

October 25, 1991

*Counsel of Record

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Mandate issued August 23, 1991 A89

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

DR. IFEOMA EZEKWO, :
 :
 Plaintiff, : 88 Civ.
 : 2378
 -against- : (CMM)
 :
 NEW YORK CITY HEALTH AND : Opinion
 HOSPITALS CORPORATION; :
 HARLEM HOSPITAL CENTER; :
 COLUMBIA UNIVERSITY :
 COLLEGE OF PHYSICIANS :
 AND SURGEONS; and :
 DR. R. LINSY FARRIS, :
 :
 Defendants. :

-----X

METZNER, Senior District Judge:

Plaintiff, Ifeoma Ezekwo, seeks damages and attorneys' fees in this action brought under 42 U.S.C. § 1983. The defendants are the New York City Health and Hospitals Corporation (Corporation), the Harlem Hospital (Hospital), which is owned and operated by the Corporation, Columbia University, whose College of Physicians and Surgeons administers the health care program at Harlem Hospital pursuant to an

affiliation contract with the Corporation, and Dr. R. Linsy Farris, the director of the Department of Ophthalmology at the Hospital.

Plaintiff, a medical doctor, applied for a residency in the Department of Ophthalmology. She was unsuccessful in her first attempt in 1981. After several other employments, Dr. Farris arranged for her to receive a paid fellowship in his department for the period March through June 1985. At that time she was successful in receiving a three-year appointment as a resident in Dr. Farris' department, commencing July 1, 1985. There were nine residents total in the program, three in each year.

Prior to plaintiff's appointment, she receive a brochure describing the residency program. The brochure stated that each third-year resident would serve four months as the Chief Resident.

At the beginning of plaintiff's third year in the program, Dr. Solomon was



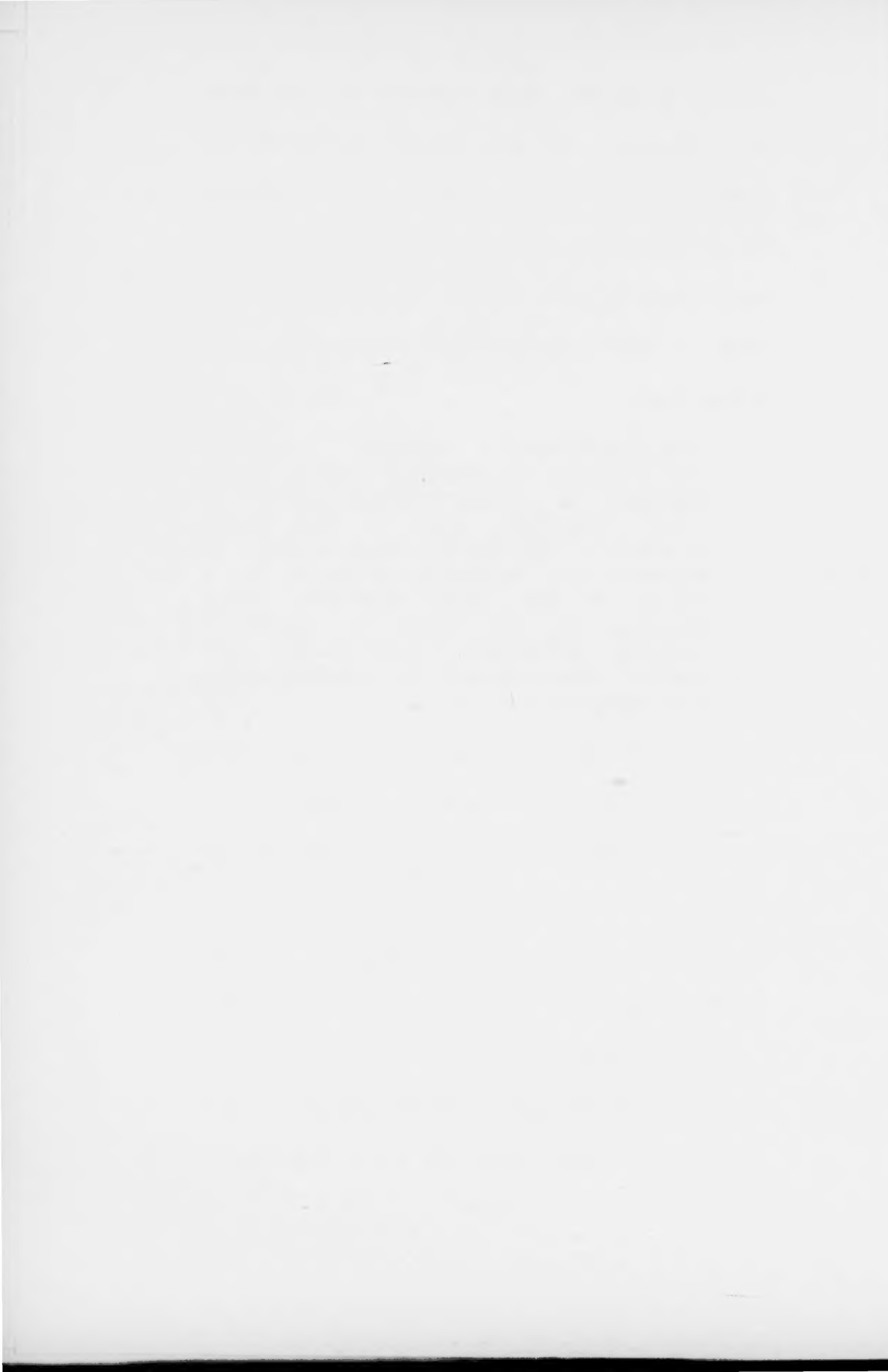
chosen to be the Chief Resident for the first four months. In the fourth month of his tenure, Dr. Farris decided that Dr. Solomon would continue as Chief Resident for the next four month period ending February 1988. The memorandum announcing this action read:

"His appointment represents a change in the previous practice of having every resident in Ophthalmology serve as Chief Resident for a four-month rotation. We intend this change to improve the residence program as a result of the Chief Resident being selected on the basis of residency training affiliation, test scores and ability demonstrated in administration and leadership."

Dr. Solomon not only served as Chief Resident for the second trimester, he continued in that position to the end of the residency year.

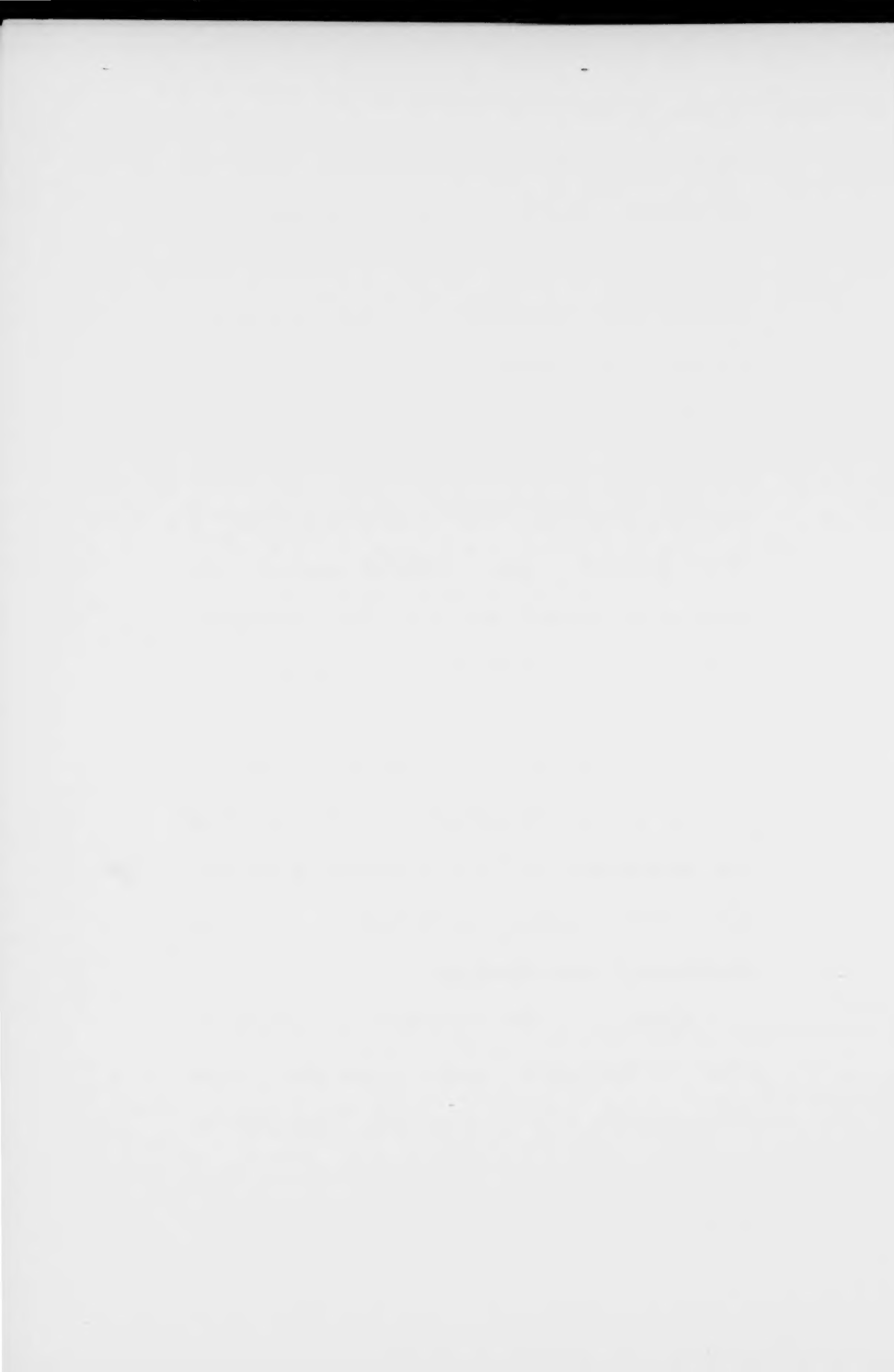
The failure of the plaintiff to become Chief Resident during her third year is the motivating factor behind this lawsuit.

Plaintiff advances three claims in her complaint. First, that her First Amendment



right to free speech was violated when the defendants denied her the Chief Residency position. She claims she was denied the position in retaliation for her complaints against the residency program and Dr. Farris, and her use of the grievance mechanism established in the union contract. Second, that her Fifth Amendment right to due process was violated when the defendants denied her the Chief Residency position, a property interest, without due process of law. Third, that defendants have infringed her Fifth Amendment protected liberty interest by acting in a manner which has stigmatized her and therefore prevented her from taking advantage of future employment opportunities.

Claim 1. To establish an actionable First Amendment claim, plaintiff must demonstrate: (1) that she engaged in protected speech, and (2) that such engagement was a motivating factor in the



adverse treatment her employer thereafter accorded her. Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977). There are numerous competing interests to be considered in this claim, and the primary one is whether the expression at issue is a "matter of public concern." Connick v. Myers, 461 U.S. 138, 143 (1983). After reviewing the written complaints made by plaintiff during her residency, it is fair to say that practically all of the material concerns personal complaints regarding her training in the program. Occasionally, a sentence will come up enlarging the complaint to perhaps indicate an involvement of the community. Such a sentence, however, in the content of her personal complaint against the program, her charges of discrimination and bias, and her personal attacks on the other doctors in the department does not make the speech a matter of public concern.



As was said in Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), "The role of the whistleblower warrants protection, but the expressions of personal dissatisfaction by discontented employees do not."

Dr. Moazed and Miss Rance, the head nurse in the Eye Clinic at Harlem Hospital, testified on behalf of the defendants. Both of these witnesses are members of minority groups. Both of them appeared favorably disposed to the plaintiff. Both of them, however, indicated that plaintiff seemed to have a chip on her shoulder, took all comments negatively, and did not get along well with her associates, despite the witnesses' efforts to smooth out any problems she may have had.

Plaintiff has failed to sustain her burden of proof on this claim. Overall, the speech was not the type that was protected, and the action by Farris was not motivated by her complaints.



Claim 2. In this claim plaintiff asserts that her Fifth Amendment right to due process was violated when the defendants denied her the Chief Residency position, a property interest, without due process of law.

In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Supreme Court defined the parameters of the property interests protected by due process. The Court stated that: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim for entitlement to it."

Defendants argue that plaintiff only had a unilateral expectation of receiving appointment to the chief residency. They claim that nowhere in the contract signed by the plaintiff is there any reference to the

fact that she would receive a four-month appointment to that position.

From a reading of the contract it is clear that not all of the duties and responsibilities of the parties are explicitly set forth. Before applying for the position, plaintiff read the brochure describing the procedure whereby each of the residents would be Chief Resident during their third year in the program. Plaintiff had more than a unilateral expectation of being Chief Resident; the position was offered to applicants as a consideration for applying for the position. Plaintiff clearly had a right to expect that defendants would live up to their offer of the appointment. Consequently, she did have a property interest in being appointed to the position.

Plaintiff was not, however, denied due process. The change in procedure adopted before the end of Dr. Solomon's rotation did not require advance notice and a hearing for

both the plaintiff and the third resident. The determination not to appoint plaintiff as Chief Resident during the second trimester was based on deficiencies in her performance in the residency, particularly in the area of interpersonal relationships, and on her lower OKAP scores. The determination was not the result of any charge of misconduct against her. Accordingly, the determination was academic and not disciplinary in nature and is akin to cases involving dismissal from school programs for academic reasons. See Board of Curator v. Horowitz, 435 U.S. 78, 86 (1978); Clemens v. County of Nassau, 835 F.2d 1000 (2d Cir. 1987).

In Campo v. New York City Employees Retirement System, 843 F.2d 96 (2d Cir. 1988), the court held that an Article 78 proceeding in a New York State court offered a due process hearing at a meaningful time and in a meaningful manner in cases similar to the one at bar. This



claim must be dismissed because plaintiff was not denied due process. She failed to avail herself of the available process to air her claim.

Claim 3. Plaintiff finally asserts that her liberty interest protected by the Fifth Amendment was infringed because she was stigmatized by her failure to receive appointment as the Chief Resident.

Plaintiff has a liberty interest which may be implicated where the government imposes a stigma that forecloses a person from other employment opportunities. To maintain such action, it must be shown that the government employer has both created and disseminated a false and defamatory impression about the employee. Codd v. Velger, 429 U.S. 624, 628 (1977).

The duties of Chief Resident are purely administrative, in addition to whatever training and experience that person would receive in the program. The failure to have

the title does not detract from the resident's professional capabilities considered for future employment. The title might enlarge the field of job opportunities, but its absence does not rise to the level of a false and defamatory impression about the employee.

Plaintiff complains that she has not received recommendations from the Ophthalmology Department in connection with the applications she has made for employment. It turns out that this claim is not true. Dr. Farris has in fact written such a letter. On the other hand, Dr. Moazed, to whom I referred above, says he refused to write such a letter because in his opinion plaintiff does not warrant it based on his observation of her work during the residency.

This claim is dismissed.



Judgment shall be entered for the
defendants.

So ordered.

Dated: New York, New York
November 8, 1991

Charles M. Metzner
U.S.D.J.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

DR. IFEOMA EZEKWO,	:	
	:	88
Plaintiff,	:	CIVIL
	:	2378
-against-	:	(CMM)
NEW YORK CITY HEALTH AND	:	Judg-
HOSPITALS CORPORATION;	:	ment
HARLEM HOSPITAL CENTER;	:	
COLUMBIA UNIVERSITY	:	
COLLEGE OF PHYSICIANS	:	
AND SURGEONS; and	:	
DR. R. LINSY FARRIS,	:	
Defendants.	:	

-----X

A non-jury trial before the Honorable CHARLES M. METZNER, U.S.D.J., having begun on October 2, 1990, and at the conclusion of the trial the Court having reserved its decision, and the Court thereafter on November 9, 1990, having handed down its opinion (#66993); directing judgment be entered for the defendants, it is,



ORDERED, ADJUDGED AND DECREED:

That the complaint be and it is hereby
dismissed.

Dated: New York, New York
November 20, 1991

Raymond F. Bughardt
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1400-August Term, 1990

(Argued April 17, 1991
Decided August 1, 1991)

Docket No. 90-9076

DR. IFEOMA EZEKWO,

Plaintiff-Appellant,

v.

NYC HEALTH & HOSPITALS CORPORATION;
HARLEM HOSPITAL CENTER;
COLUMBIA UNIVERSITY, College of
Physicians And Surgeons; DR. LINSY
R. FARRIS,

Defendants-Appellees.

B e f o r e :

TIMBERS, MESKILL and PRATT,

Circuit Judges.



Appeal from a judgment entered in the United States District Court for the Southern District of New York, Metzner, J., following a bench trial. The district court dismissed Ezekwo's claims for relief under 42 U.S.C. § 1983 and ordered entry of judgment in favor of the defendants-appellees.

Affirmed in part, reversed in part and remanded. Judge Timbers concurs in part and dissents in part in a separate opinion.

MICHAEL H. SUSSMAN, Goshen, NY, *for Appellant.*

FRED KOLIKOFF, Office of the Corporation Counsel, New York City (Victor A. Kovner, Corporation Counsel of the City of New York, Larry A. Sonnenshein, Michael Pleters, Office of the Corporation Counsel, New York City, of counsel), *for Appellees.*

MESKILL, *Circuit Judge:*

Dr. Ifeoma Ezekwo (Ezekwo), a medical doctor, appeals from a judgment of the United States District Court for the Southern District of New York, Metzner, J., entered on November 20, 1990. Following a bench trial, the district court ordered the dismissal of Ezekwo's claims for relief under 42

U.S.C. § 1983 and the entry of judgment in favor of the appellees, New York City Health and Hospitals Corporation, Harlem Hospital Center, Columbia University College of Physicians and Surgeons, and Dr. Linsy R. Farris (collectively "defendants"). Ezekwo alleged that (1) she was denied the position of "Chief Resident" because she exercised her First Amendment rights, (2) she possessed a constitutionally protected property interest in the position of "Chief Resident" which she was denied without due process, and (3) the defendants violated her right to due process by interfering with a protected liberty interest. The district court concluded that Ezekwo's written and verbal communications to her supervisors were not protected by the First Amendment and that her liberty interest had not been unconstitutionally infringed. Additionally, the district court held that Ezekwo possessed a legitimate claim of entitlement to the

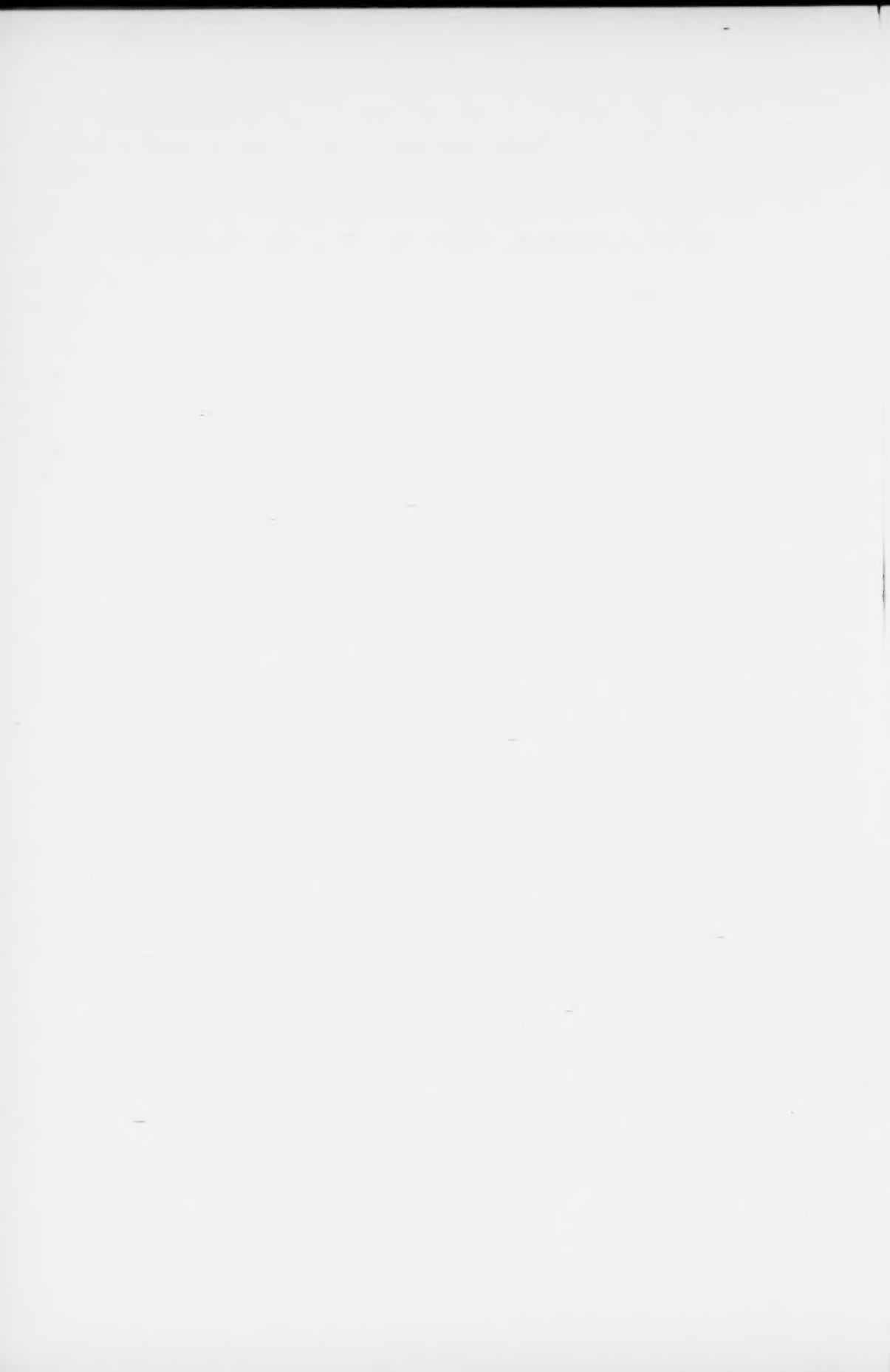


position of Chief Resident that rose to the level of a protected property interest. The court concluded, however, that the decision to deny Ezekwo the position of Chief Resident was based on academic criteria and that she had been afforded all the process that she was due.

We affirm in part, reverse in part and remand the case to the district court for the limited purpose of calculating damages.

BACKGROUND

Dr. Ezekwo is a female medical doctor and a native of Nigeria. In March 1985, she was accepted into the ophthalmology residency program at Harlem Hospital Center (HHC). HHC is a unit of the New York City Health and Hospitals Corporation. Pursuant to a contract with the Health and Hospitals Corporation, HHC's ophthalmology department is administered and staffed by the College of Physicians and Surgeons of Columbia University. HHC patients are treated at a



clinic located within the hospital and at an off-site clinic, the Sydenham Neighborhood Family Care Center.

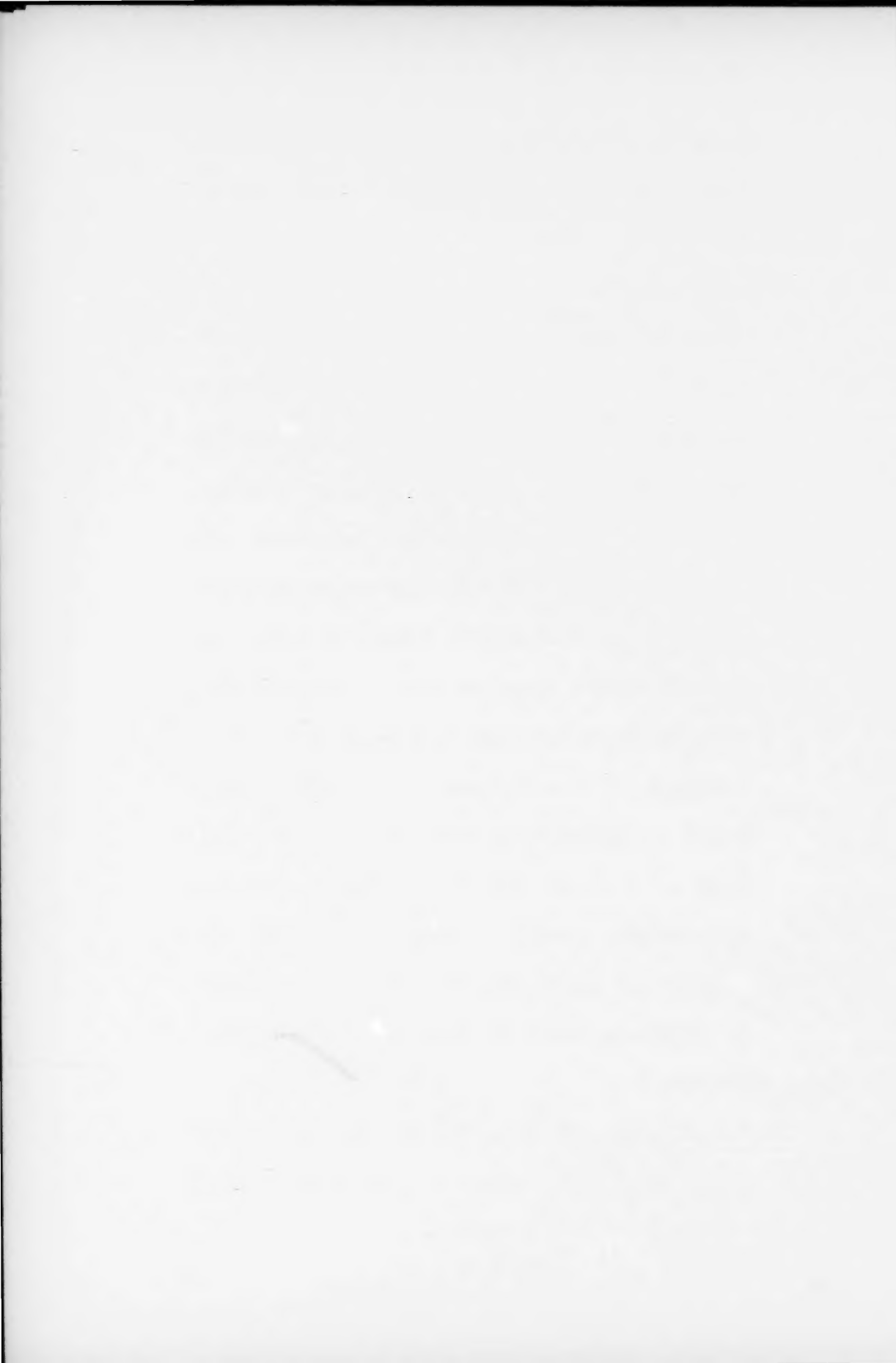
Ezekwo began her residency program at HHC in July 1985. Dr. R. Linsy Farris (Farris) was the chief of HHC's ophthalmology department and director of the residency program. - Dr. Milton Delerme was coordinator of the program and in charge of the residents. HHC's residency program requires three years of training and consists of nine residents -- three for each training year. Residents in the program learn to diagnose and to treat eye disorders through lectures and the treatment of patients. Thirteen "attending physicians" supervise and provide guidance to the residents on a day-to-day basis.

The brochure, which HHC made available to prospective residents at the time Ezekwo was accepted, described the program and stated that each HHC resident would



serve as "Chief Resident" for four months during his or her third year. The position of Chief Resident carried with it administrative and organizational responsibilities. Specifically, the Chief Resident was responsible for scheduling surgeries and lectures, and establishing work assignments. In addition, the resident who assumed the position received an increased salary and the designation of Chief Resident was of some future professional value. HHC's practice was to rotate third year residents through the position of Chief Resident. The sequence of rotation was based on alphabetical order in one year and then, in the following year, reverse alphabetical order. Appointment to the position of Chief Resident was never based on academic merit or any formal evaluative process.

The record indicates that Ezekwo's first year in the residency program went



smoothly. During the latter half of her second year and the early stages of her third year, however, she began to direct several verbal complaints to Dr. Farris, the director of the program. Additionally, Ezekwo authored a series of letters and memoranda concerning areas of personal dissatisfaction. Ezekwo's complaints related to, among other things: (1) the failure of attending physicians and lecturers to be present at scheduled times, (2) the manner in which she was treated by Dr. Farris and the attending physicians, (3) the manner in which Dr. Farris evaluated her performance, (4) her lack of opportunity to perform surgery, (5) the lack of personal attention she received from the attending physicians, (6) the lack of proper hospital maintenance, (7) Dr. Farris' poor management and motivational skills, and (8) the poor teaching methods of the attending physicians.



In a memorandum dated April 10, 1987, Ezekwo challenged the "less than satisfactory" review that she received during her February 25, 1987 evaluation. She asserted that her poor evaluation was the product of "malice, discrimination and conspiracy," and "retaliation" for her outspoken opinions on how to improve the HHC residency program. Ezekwo threatened, "I will escalate this issue." She also advised Dr. Farris that she had filed a grievance against him with the Committee of Interns and Residents (CIR), the collective bargaining agent for interns and residents employed by the New York Health and Hospitals Corporation. On the same day, Ezekwo sent a letter to CIR requesting that a grievance be filed. In that letter, she alleged that Dr. Farris discriminated against her on the basis of her race and gender and retaliated against her for her comments about the program. Ezekwo highlighted her own



skills and detailed incidents during which she allegedly was treated improperly by Dr. Farris.

On June 17, 1987, the end of her second year in the program, Ezekwo received her year end evaluation. In general, this review, like the earlier one, evaluated her performance in a variety of areas. Ezekwo generally received evaluations which ranged from satisfactory to above satisfactory. However, Ezekwo's surgical skills were graded as unsatisfactory. Her overall evaluation was 5.5 -- slightly above satisfactory. The evaluation was conducted by Doctor Farris and Delerme.

During the month of June 1987, Dr. Delerme met with all of the rising third year residents and advised them that their rotation as Chief Resident would take place in reverse alphabetical order -- Solomon, Ezekwo and Castillo. Under this arrangement, Solomon would begin as Chief



Resident in July and would continue in that position until the end of October. Ezekwo then would assume the responsibilities from November 1987 until the end of February 1988.

On June 29, 1987, Ezekwo wrote to HHC's equal employment opportunity (EEO) officer alleging that Dr. Farris was discriminating against her on the basis of race and gender. Ezekwo reasserted many of her former complaints and made new allegations including that Dr. Farris had fabricated information in her departmental file and engaged in "smear tactics" aimed at damaging her career as a physician. She again contacted the EEO officer on August 6, 1987, August 15, 1987, and September 25, 1987, concerning this alleged discrimination. In her August 15 letter, Ezekwo alleged discrimination on the basis of gender, race and national origin. She also stated that she was "being deprived the opportunity to



learn surgery and specialised [sic] ophthalmic procedures" and was "being given wrong information regarding ophthalmic skills." It was not until October 1, 1987, that Dr. Farris received notification that Ezekwo had filed an EEOC complaint against him.

During June and July of 1987, Dr. Farris began discussing with other supervising physicians the possibility of not making Ezekwo Chief Resident. In August or September, Dr. Farris held a meeting with the attending physicians to discuss whether Ezekwo should succeed Solomon as the Chief Resident as previously scheduled. The consensus was that she should not, but the final decision was left to Dr. Farris. Dr. Farris conducted yet another meeting on October 16, 1987, approximately two weeks prior to Ezekwo's scheduled date to become Chief Resident. At that meeting, Dr. Farris met with Dr. Delerme and some of the

attending physicians, as well as the director of personnel at Columbia. During the course of this meeting, Ezekwo's academic performance, her medical skills, and her memo writing campaign were the focus of discussion. Indeed, the possibility of dismissing her from the program altogether was discussed. That same day the decision to go from a rotational system for selecting a Chief Resident to a "merit based" process was made. The change was announced by memorandum dated October 21, 1987 from Dr. Farris, addressed to all of the attending physicians and residents. That memorandum provided in pertinent part:

Emmanuel R. Solomon has accepted the appointment of Chief Resident in the Department of Ophthalmology to continue during the next four month resident rotation, November 1987 thru February 1988. His appointment represents a change in the previous



practice of having every resident in Ophthalmology serve as Chief Resident for a four month rotation. We anticipate this change to improve the residency program as a result of the Chief Resident being selected on the basis of residency training evaluation, test scores and ability demonstrated in administration and leadership.

The memorandum's reference to test scores relates to a resident's performance on a national examination administered by the American Academy of Ophthalmology known as the OKAP examination. The OKAP exam is administered to ophthalmology residents at various stages of their training. The test scores evaluate an individual resident's performance relative to that of all others with similar training that have taken the examination. All HHC residents annually sit for the examination. Prior to the issuance of this memorandum, however, HHC never



had utilized this information as a basis for selecting the Chief Resident.

After she was passed over for Chief Resident, Ezekwo continued to write memoranda protesting her treatment and complaining about inadequacies in the program. Specifically, she sent a memorandum dated November 20, 1987, to Dr. Farris in which she objected to the sudden change in the method of selecting a Chief Resident. Ezekwo alleged in the memo that the basis for denying her the position was Dr. Farris' desire to "decrease [her] surgical volume and to smear her reputation." She detailed her commitment to the program, noted her high level of performance, and reiterated her complaints about how the program was run. Ezekwo also attributed her poor performance on the OKAP exam to the inferior training that she had received at HHC. Ezekwo's memo



writing campaign continued until the end of her residency.

In June 1988, Ezekwo successfully graduated from the residency program; she currently maintains a private medical practice in New York City. Ezekwo has not yet taken the examinations that would qualify her for Board certification. Ezekwo has applied for post-graduate fellowships in ophthalmology but has not been accepted into any program. She also has experienced difficulty in gaining admitting privileges at Montefiore Hospital Center and Our Lady of Mercy Medical Center, which, in part, can be attributed to the decision of some doctors at HHC not to write letters of recommendation.

Ezekwo initiated this action against the defendants on April 4, 1988 alleging violations of 42 U.S.C. § 1983 and seeking \$10 million in compensatory damages and \$3 million in punitive damages as well as



attorney's fees. In her complaint, she advanced three claims: (1) the defendants acting under color of state law violated her First Amendment right to free speech when they denied her the position of Chief Resident in retaliation for her complaints against Dr. Farris and the program, (2) she was denied a property interest without due process when she was passed over for Chief Resident in violation of the Fifth and Fourteenth Amendments, and (3) her liberty interest protected by the Fifth and Fourteenth Amendments was violated because the conduct of the defendants has stigmatized her and limited her professional opportunities.

After conducting a four day bench trial, the district court dismissed each one of these claims. In an opinion dated November 8, 1990, the district court concluded that Ezekwo's statements and memos did not relate to matters of public



concern and, therefore, were not protected by the First Amendment. The court, finding that Ezekwo's future employment opportunities had not been foreclosed, rejected her liberty interest claim. Finally, although the district court determined that Ezekwo's claim of entitlement to the position of Chief Resident rose to the level of a property interest, it found that the basis for HHC's decision not to make her Chief Resident was purely academic and not disciplinary. Accordingly, the court held that prior notice and a hearing were not required. Pursuant to the district court's instructions, the complaint was dismissed and judgment was entered in favor of the defendants on November 20, 1990.

DISCUSSION

Ezekwo contends that the district court's factual findings regarding the basis for HHC's decision to deny her the Chief Residency are clearly erroneous. Ezekwo



argues that the decision was not an academic choice, but rather was an action taken to punish her and to retaliate for her outspoken criticism of Dr. Farris and the HHC program. She, therefore, submits that some form of due process hearing was required. Additionally, Ezekwo challenges the district court's determination that her speech was not entitled to First Amendment protection as a matter of law. Regarding the district court's decision to dismiss Ezekwo's liberty interest claim, we note that the parties have not challenged the correctness of that decision either in their briefs or during oral argument. We, therefore, do not address that issue here.

A. Standard of Review

In reviewing the decision below we must determine whether the district judge applied the correct legal principles and whether his findings of fact were "clearly erroneous." *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*,



779 F.2d 866, 871 (2d Cir. 1985); Fed. R. Civ. P. 52(a) ("findings of fact . . . shall not be set aside unless clearly erroneous"). We give consideration deference to the district court's credibility assessments and to its determination as to what inferences should be drawn from the evidence in the record. *Puritan Ins. Co.*, 779 F.2d at 871; see also 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2585, at 731 (1971). Accordingly, the factual findings of the district court will not be set aside unless they are without adequate support in the record, are against the clear weight of the evidence, or the product of an erroneous view of the law. 9 *Federal Practice & Procedure* § 2585, at 734-35; *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984). When reviewing a district court's legal conclusions, our scope of review is *de novo*.



9 *Federal Practice & Procedure* § 2588, at 750.

B. The First Amendment Claim

It is well established that a public employer cannot discharge or retaliate against an employee for the exercise of his or her First Amendment free speech right. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). As the Supreme Court has counselled: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Recognizing the competing interests involved, the Supreme Court has concluded that a court's task is to seek a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State,



as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

A public employee who claims to have been discharged or disciplined for the exercise of First Amendment rights must establish two elements to prevail on the claim: (1) that the conduct at issue was protected speech; and (2) that the speech played a substantial part in the employer's adverse employment action; *i.e.*, that the adverse action would not have occurred *but for* the employee's protected actions. See *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); *Givhan v. Western Line Consol. School District*, 439 U.S. 410, 416-17 (1979).

Here, the district court never addressed the second issue because it concluded as a matter of law that Ezekwo's conduct was not protected speech. The

issue of whether certain speech is protected by the First Amendment is one of law for the court. See *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). The pertinent question is whether the speech at issue can "be fairly characterized as constituting speech on a matter of public concern." *Id.* at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Only if the statements involved address a matter of public concern is it necessary for a court to balance the interests of the speaker against the state's interest in efficient government. *Rankin*, 483 U.S. at 388. The mere fact that a public employee chooses to discuss privately his concerns with his employer as opposed to expressing his views publicly does not alter the analysis. See *Givhan*, 439 U.S. at 414. To hold that certain speech by a public

employee does not relate to matters of public concern, however, is not to say that such speech is beyond the protection of the First Amendment in all respects. *Connick*, 461 U.S. at 147. Instead, it merely indicates that not all speech by a public employee can provide the basis for a constitutional cause of action. *Id.* The requirement that the speech at issue involve matters of public concern "reflects both the historical involvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143.

Viewed objectively and as a whole, Ezekwo's statements did not address matters of public concern. Her complaint were personal in nature and generally related to her own situation within the HHC residency program. Our review of her prolific writings convinces us that Ezekwo was not

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on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation and individual development as a doctor. As the *Connick* Court succinctly observed:

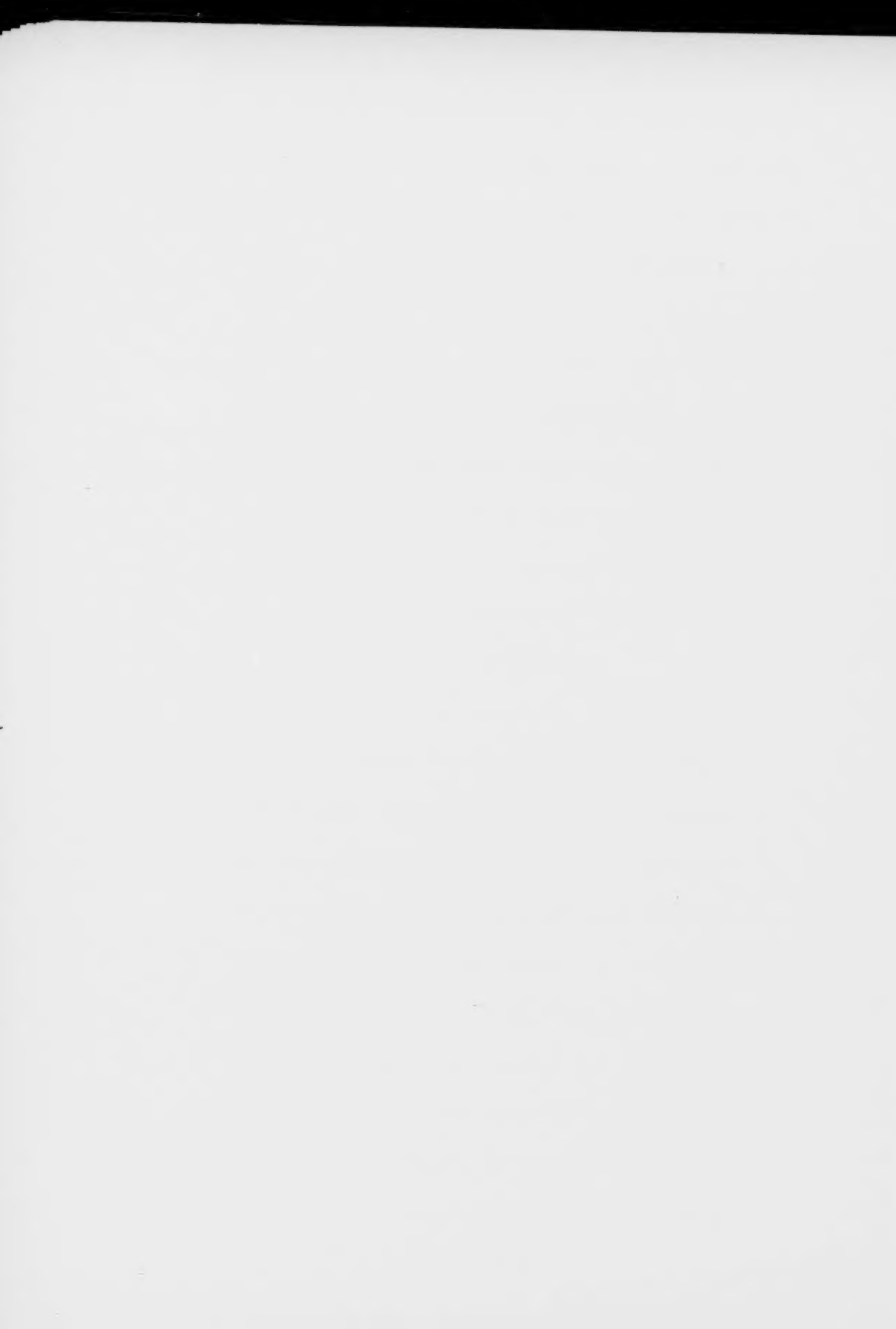
To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs.

Id. at 149. The district court correctly reasoned that the mere fact that one or two of Ezekwo's comments could be construed



broadly to implicate matters of public concern does not alter the general nature of her statements. As the *Connick* Court emphasized:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.



Id. at 147 (internal citation omitted). Ezekwo's statements did not relate to matters of public concern and the district court correctly so held.

C. Due Process/Property Right

Ezekwo asserts that she was denied the Chief Resident position, a property right, without due process. The district court concluded that Ezekwo did possess a property interest in the Chief Resident position, but because the decision was academically motivated, no process was due. Ezekwo submits that the district court erred in finding that the decision was academically based. HHC and the other appellees argue that the district court's decision should be upheld. Additionally, they offer an alternative basis for affirming the district court's disposition of this claim. They assert that the court erred as a matter of law in concluding that Ezekwo possessed a property interest. Of course, if this were



true, the protections of the Fifth and Fourteenth Amendments would be rendered inapplicable.

While the Fourteenth Amendment's procedural requirements protect property, that property can take many forms. In general, the nature and contours of a specific property interest are defined by some source independent of the Constitution -- most often state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The term " 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' " *Sindermann*, 408 U.S. at 601 (quoting *Roth*, 408 U.S. at 577). "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.* (citation omitted). As the *Roth* Court declared: "To have a



property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

The defendants argue that Ezekwo only had a unilateral expectation of becoming Chief Resident because neither her individual written contract nor the residents' collective bargaining agreement mentions any formal right to the Chief Residency. We disagree. While the presence of such a provision obviously would make the existence of the right much more apparent, its absence does not foreclose the possibility that Ezekwo possessed a "property" interest in the Chief Resident position. *See Sindermann*, 408 U.S. at 601. In *Sindermann*, the Supreme Court noted that principles of contract law recognize that not every term of a contract must be reduced to writing. Additional contractual provisions may be "implied" into



a contract as a result of a course of dealing between the parties. The parties through their conduct and practice can create additional rights and duties. *Id.* at 602 (university's adherence to a particular pattern of conduct could create an expectation of continued employment in employees who lacked tenure).

While state law defines the underlying substantive interest, "federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577). In particular, not every contractual benefit rises to the level of a constitutionally protected property interest. "It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a [state actor] into a federal claim." *San Bernardino Physicians'*



Services Medical Group. v. County of San Bernardino, 825 F.2d 1404, 1408 (9th Cir. 1987); *see also Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) (a simple contract dispute does not give rise to a cause of action under section 1983).

We reject the defendants' attempt to equate the instant situation with cases dealing with the denial of certain employment benefits. A close examination of those cases reveals the weakness of this argument. While every breach of a public employment contract may not be a deprivation of property within the meaning of the Due Process Clause, *see Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983), the adverse action taken in this case was not the product of routine discipline. Compare *Carter v. Western Reserve Psychiatrist Habilitation*, 767 F.2d 270, 272 n.1 (6th Cir. 1985). Nor did it involve such a trivial and insubstantial interest as the purported right to a specific



vacation period. Compare *Altman v. Hurst*, 734 F.2d 1240, 1242 (7th Cir.), cert. denied, 469 U.S. 982 (1984). Here, the "policies and practices" of the institution were such that an entitlement to the position of Chief Resident existed and the district court correctly so held.

The dissenting opinion agrees with the defendants that this case merely presents a situation in which a public employee is denied a particular work assignment or employment benefit-interests that are not entitled to the protections afforded by the Due Process Clause. We, however, find that characterization to be unpersuasive and to ignore the special nature of the Chief Resident designation as well as the particular facts of this case. In *Brienen*, 722 F.2d 360, the case upon which the dissenting opinion places a great deal of reliance, deputy sheriffs alleged that the sheriff had denied them property without due process



when he refused to permit them to take off accrued compensatory time as had previously been promised. *Id.* at 362. In rejecting the claim, the *Brienen* Court simply recognized the rather obvious principal of law that not every breach of contractual right rises to the level of a deprivation of property. *Id.* at 364-65. Nevertheless, the *Brienen* Court acknowledged that certain contractual rights are entitled to federal protection under the Fourteenth Amendment.

In determining which interests are afforded such protection, a court must look to whether the interest involved would be protected under state law and must weigh "the importance to the holder of the right." *Id.* at 364. Here, HHC adopted a policy and practice of awarding the position of Chief Resident to all third year residents on a rotating basis. This method of selection was not haphazardly applied; it was an established practice which was expressly



highlighted in HHC's informational documents. While we can find no evidence in the record concerning how long this method of selection was utilized, it is plain that the practice predated Ezekwo's admittance to the program and continued while she was there. Ezekwo's expectation of obtaining the position was further enhanced when she was verbally advised in June 1987 that she would be Chief Resident from November 1987 until February 1988. Thus, Ezekwo consistently had been informed that she would rotate through the position of Chief Resident and receive a salary differential as a result of that designation. We think that this course of conduct, coupled with Ezekwo's reasonable reliance thereon, created a contractual right that rose to the level of a significant property interest that would be protected under state law. *See id.* Moreover, Ezekwo's interest in the position of Chief Resident was more



than merely financial. To a member of the medical profession the designation of Chief Resident is of special importance because it denotes the culmination of years of study. Additionally, it is necessarily a position that an individual can occupy only once in his or her career. Thus, unlike the trivial interest at issue in *Brienen*, the interest at stake here, due in large part to the very nature of medical training itself, was of significant professional value. Accordingly, we agree with the district court that Ezekwo's expectation of performing the duties of Chief Resident was reasonable and well founded and rose to the level of a property interest entitled to the protections afforded by the Due Process Clause.

Having found the existence of a property interest, we must now determine whether Ezekwo received the process that she was due. To determine what, if any,



procedural protections the Constitution requires, we must consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In some instances, it also has been held that the availability under state law of a post-deprivation hearing or tort remedies completely will satisfy due process and bar a section 1983 claim. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (state tort remedy adequate protection for alleged

intentional destruction of prisoner's property); *Parratt v. Taylor*, 451 U.S. 527, 541-44 (1981) (state tort action sufficient protection for alleged negligent destruction of prisoner's property), *overruled in part*, *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (mere negligence on part of state official cannot work a constitutional deprivation of property); *see also Ramsey v. Board of Educ. of Whitley County, Kentucky*, 844 F.2d 1268, 1273 (6th Cir. 1988) (state contract action adequate remedy for denial of accumulated sick days); *Costello*, 811 F.2d at 784 (grievance procedure was sufficient remedy for retired police officers' claims of denial of increase in pension benefits).

Recently, in *Zinermon v. Burch*, 110 S. Ct. 975 (1990), the Supreme Court, seeking to clarify its earlier decisions, identified the circumstances under which the availability of post-deprivation state

remedies will bar a section 1983 claim. The *Zinermon* Court concluded that its earlier decisions in *Parratt* and *Hudson* stand for the principle that in some instances a deprivation of property may be so random and unpredictable that the provision of pre-deprivation proceedings is impossible. Both *Hudson* and *Parratt* involved claims by prisoners who alleged that prison guards had destroyed their property. In those cases, the Court held that the state could not foresee when the deprivation would occur and its ability to provide pre-deprivation process was non-existent. The *Zinermon* Court contrasted these prior cases with a situation in which the alleged deprivation was predictable, pre-deprivation procedures were possible, and the alleged improper conduct was taken by those who were acting within their authority. *Id.* at 989-90.



In the instant case, HHC's residency directors and doctors carefully deliberated about changing the method of selection for Chief Resident before deciding to apply that new standard, thereby denying Ezekwo the position. Plainly, the conduct of these officials was not random or unpredictable. The situation was well suited to the use of pre-deprivation processes. See *id.* Moreover, in denying Ezekwo the position, the program directors were not acting beyond their delegated authority; they possessed the authority "to effect the very deprivation complained of here." *Id.* at 990. These officials were responsible for all aspects of the residency program and their discretion was essentially unrestricted. Thus, the potential availability of a state law contract action does not bar this suit. The next question, of course, is what, if any, process was due Ezekwo.



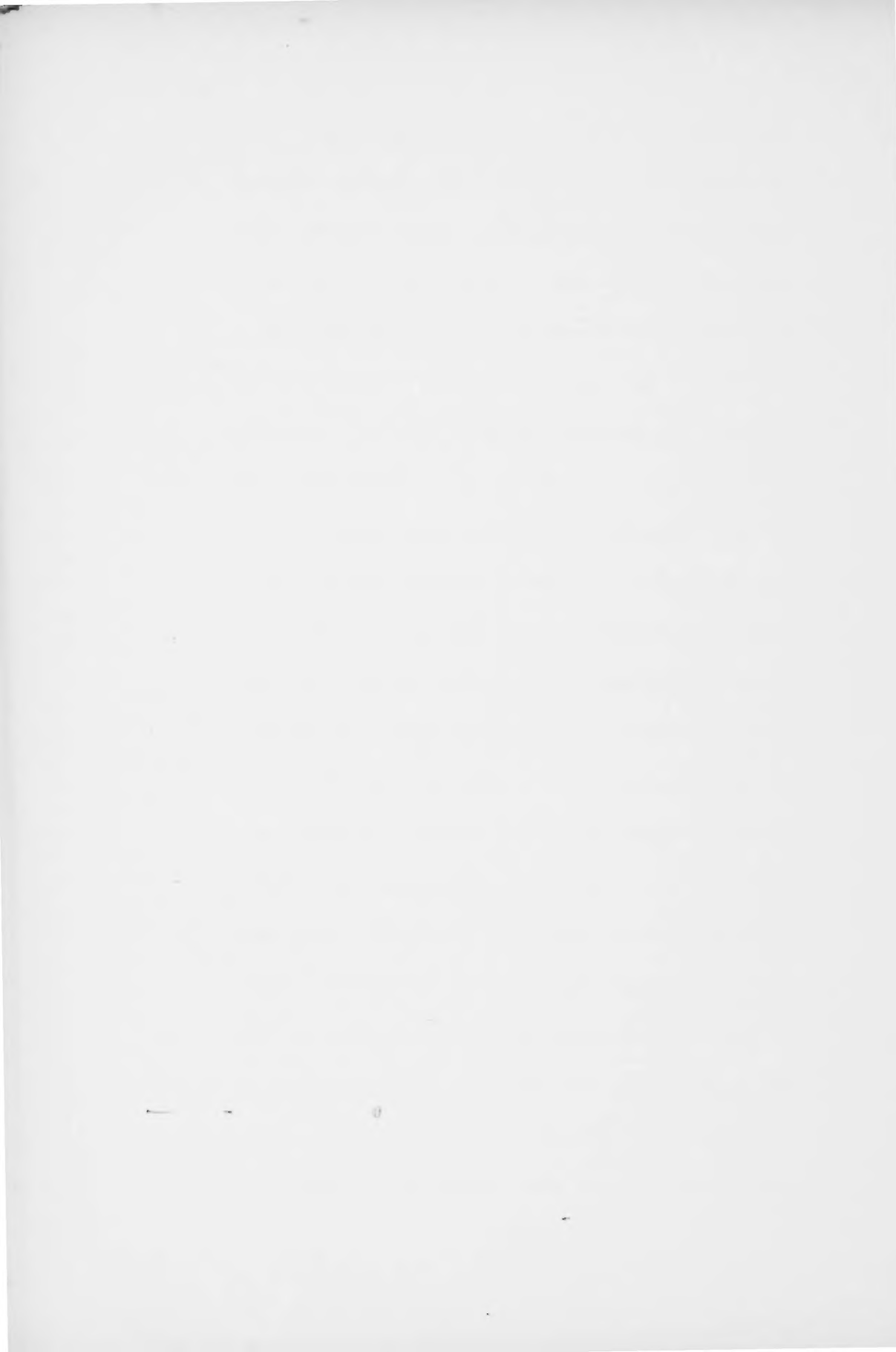
The district court found that the basis for HHC's decision to pass over Ezekwo was purely academic and, therefore, no process was due. While concerns about Ezekwo's interpersonal skills and combative nature may have been justified and, indeed, may have provided an independent basis for denying her the position, the injection of entirely new selection criteria at the eleventh hour casts some doubt on the truly "academic" nature of the decision.

Even assuming the academic nature of the decision, we are of the opinion that Ezekwo was due at least some modicum of process. The district court appears to have been operating on the assumption that in all instances where academic decisions are involved no process is due. In making its determination, the district court relied on *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978). *Horowitz* establishes the principle that in most



instances when academic decisions are involved courts should not impose formal procedural requirements, for there, the academic process provides sufficient procedural protections. *Id.* at 85. We, however, do not understand *Horowitz* to impose a blanket prohibition on judicial intervention. Moreover, *Horowitz* is distinguishable from the instant case.

Horowitz involved a medical student who was dismissed from the University of Missouri-Kansas City Medical School during her final year of study for failure to satisfy academic standards. The medical student, prior to her dismissal from the program, had been advised of the faculty's dissatisfaction with her clinical progress and informed that these problems could jeopardize her continued participation in the program. *Id.* at 80-81. The decision to dismiss the student was careful and deliberate and the institution had an



"historically supported interest . . . in preserving its . . . framework for academic evaluations." *Id.* at 86 n.3. Considering all of the relevant factors, the Supreme Court concluded that the Due Process Clause did not require any "hearing" beyond the formal procedures provided by the academic evaluation process and expressed its hesitancy to invade the area of academic evaluations:

Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.

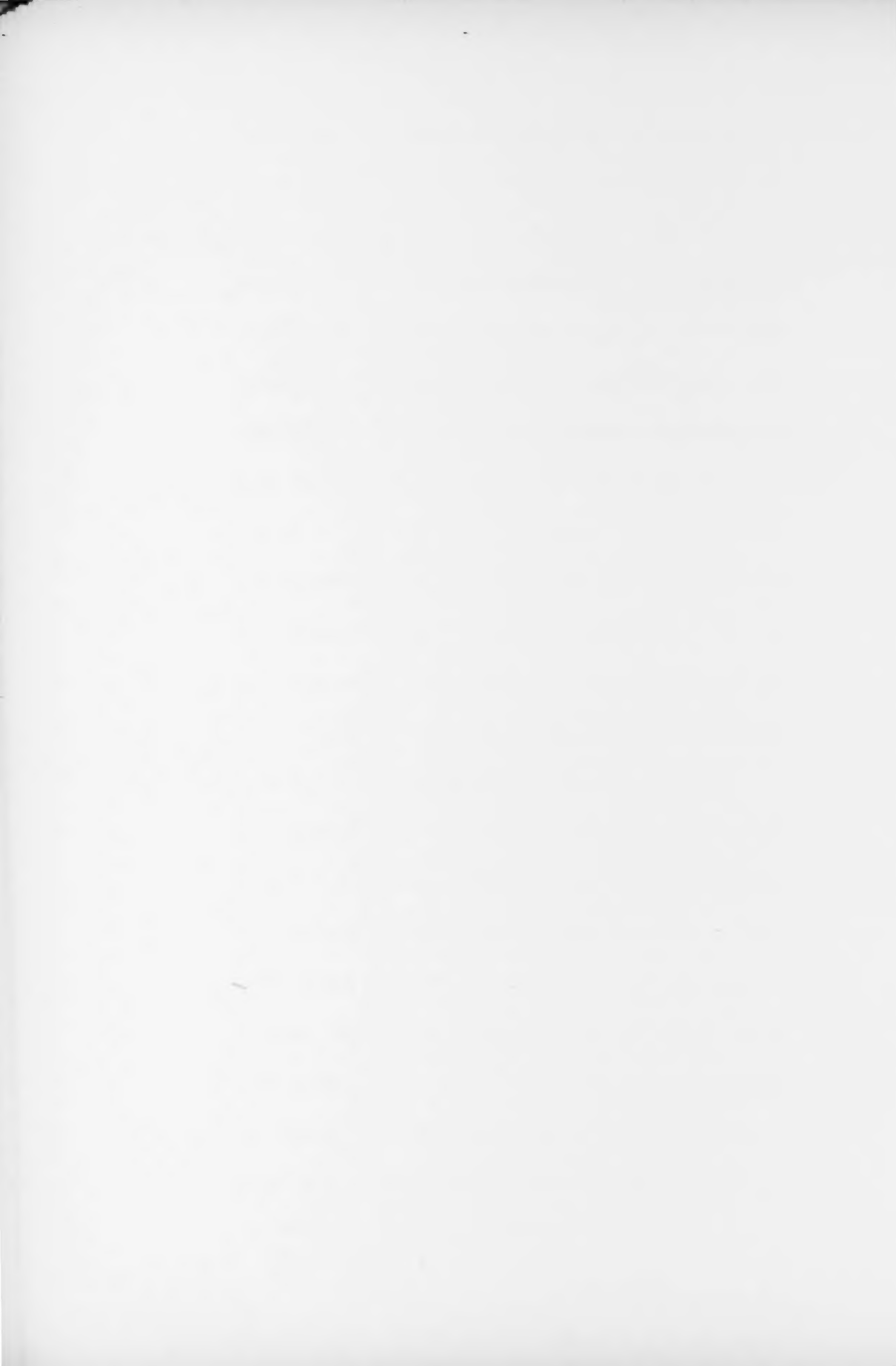
Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the



academic dismissal process by requiring a hearing.

Id. at 90. Thus, the *Horowitz* Court emphasized the importance of judicial deference to academic decisions. However, the institution in *Horowitz* had long established academic criteria and repeatedly had advised the student involved that her performance was not meeting those standards, and that if it did not improve, would prevent her from continued enrollment. *Id.* at 85. Such is not the situation presented here.

The decision to pass over Ezekwo directly resulted from HHC's decision to adopt entirely new selection criteria. These new criteria were not made known to residents in the program until after the final decision on Ezekwo had been made. Such conduct is insufficient to satisfy due process. While a medical residency program is largely an academic undertaking, it also



is an employment relationship. This is most clearly evidenced by the existence of formal employment contracts and collective bargaining agreements. In light of these circumstances, we believe that some minimal steps should have been taken to inform the parties who stood to be adversely affected by HHC's change in the method of selection and to provide them with some opportunity to demonstrate either that their past performance satisfied the new criteria or that the criteria should not be applied to them. While it is unlikely that the administrators would have reversed the decision to change the selection criteria, Ezekwo should have had an opportunity to persuade the administrators to delay the implementation of the new criteria until her expectations had been fulfilled. Our decision to impose such a process requirement neither threatens the academic integrity of the residency program nor does

it undermine the institution's academic freedom. Finally, the financial and administrative burden that such a requirement imposes would be minimal.

It warrants emphasis that this is not a case in which the residency program administrators believed that Ezekwo presented a threat to patient safety. Of course, in such a situation, the program administrators would be justified in immediately removing the resident subject to some post-removal review. Such is not the case here. Indeed, the administrators permitted Ezekwo to remain in the program, to perform surgeries, and to graduate from the program. Given these circumstances, the failure to provide some form of pre-deprivation process cannot be excused. *See Caine v. Hardy*, 905 F.2d 858, 860-62 (hospital must provide hearing to doctor before revoking staff privileges), *reh'g in banc granted*, 905 F.2d at 867 (5th Cir.

1990). HHC, at a minimum, should have informed Ezekwo of the basis for its action and should have provided her with an opportunity to respond to its concerns before a final decision was made. These steps could have been accomplished through informal procedures; no formal hearing was required.

We, therefore, hold that the district court erred in concluding that the requirements of the Due Process Clause were satisfied. Accordingly, we reverse the judgment of the district court as to that claim. The only evidence of actual damage suffered by Ezekwo as a result of the deprivation of due process was the loss of the pay differential that accompanied the designation of Chief Resident. On remand, therefore, the district court's damages inquiry should be limited to calculating that amount. Costs also should be awarded to the appellant. Our review of the record



demonstrates that an award of punitive damages is unwarranted.

CONCLUSION

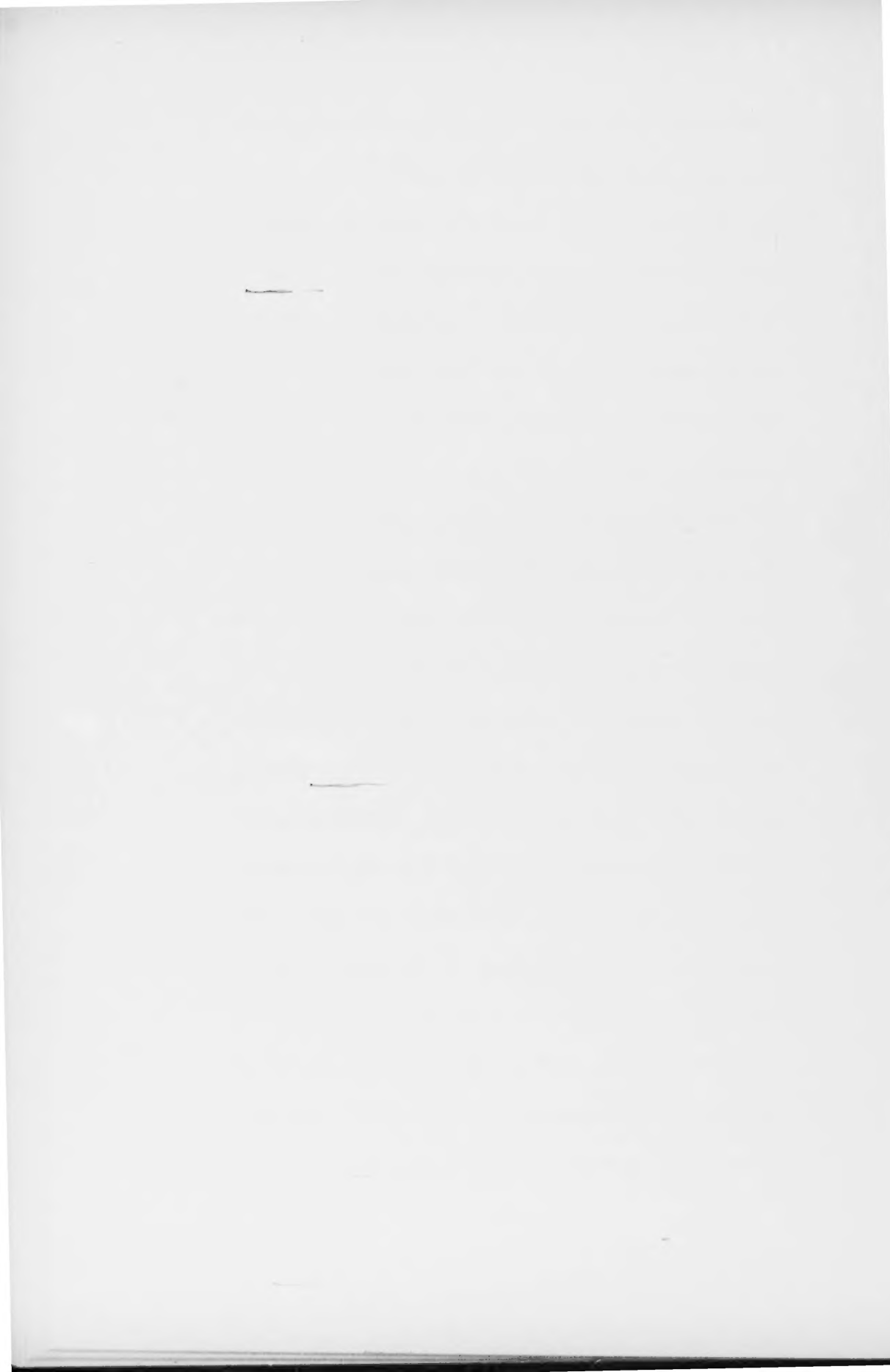
The district court correctly concluded that the statements at issue did not involve matters of public concern and, therefore, were not protected by the First Amendment. However, the district court erred in concluding that the requirements of the Due Process Clause had been satisfied. HHC and the residency program directors should have notified Ezekwo of the change in policy and given her an opportunity to address their concerns before utilizing the policy against her. Accordingly, the judgment of the district court is reversed as to that claim and the case remanded solely for a calculation of compensatory damages. The district court, of course, also will have to resolve the issue of attorney's fees.



TIMBERS, *Circuit Judge*, concurring in part and dissenting in part:

To the extent that the majority affirms the district court's rejection of appellant's first amendment claim, I concur. To the extent that it reverses the district court's holding that appellant was not denied due process, I dissent.

In reversing the district court today on the due process claim, the majority holds that a medical resident was due "some modicum of process" before supervisors of a medical residency program changed the way they chose chief residents. Because I agree with the district court that the chief residency decision was a purely academic one for which no additional process was required, and because I further believe that appellant Ezekwo had no constitutionally protected property interest in the first instance, I respectfully dissent from that portion of the majority opinion



that reverses the district court on the ground that Ezekwo was denied due process.

I.

Turning first to the factual findings made by the district court, while the majority gives lip-service to the oft-quoted standard that a district court's findings of fact will not be set aside unless "clearly erroneous," *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 871 (2 Cir. 1985), it gives short shrift to the district court's explicit finding that the chief residency determination "was academic and not disciplinary in nature" -- a distinction that is critical in assessing Ezekwo's due process claim. The majority states that "the injection of entirely new selection criteria at the eleventh hour casts some doubt on the truly 'academic' nature of the decision."

In my view, the majority gives insufficient weight to the findings of the

district court. The Supreme Court has admonished that "[w]here there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (emphasis added). After hearing testimony and reviewing evidence during a four-day bench trial, the district court specifically found that:

"The determination not to appoint plaintiff as Chief Resident during the second trimester was based on deficiencies in her performance in the residency, particularly in the area of interpersonal relationships, and on her lower OKAP scores. The determination was not the result of any charge of misconduct against her. Accordingly, the determination was academic and not disciplinary in nature and is akin to

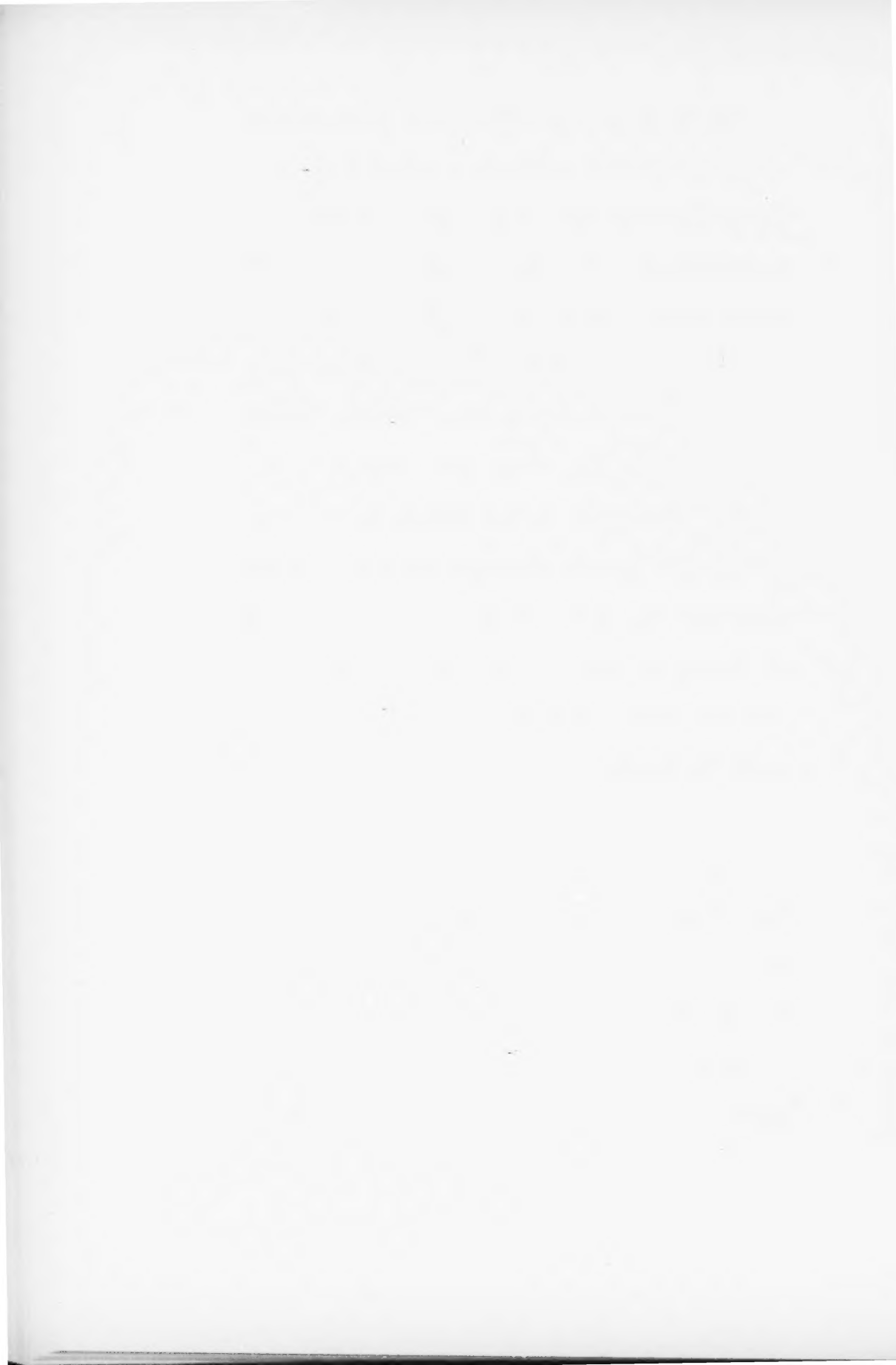


cases involving dismissal from school programs for academic reasons."

These findings are "thorough, careful and comprehensive. They come to us 'well armed with buckler and shield'" *DeGuio v. United States*, 920 F.2d 103, 106 (1 Cir. 1990) (quoting *Horton v. United States Steel Corp.*, 286 F.2d 710, 713 (5 Cir. 1961). Far from being clearly erroneous, the district court's findings here are solidly supported by the record. There simply is no basis in the record for the majority's "doubt" with respect to the accuracy of those findings.

II.

Turning next to the majority's statement that "[e]ven assuming the academic nature of the decision, we are of the opinion that Ezekwo was due some modicum of process", I agree with the district court that appellees were constitutionally permitted, in the manner in which they did, to make an



academic change in the criteria used for selecting chief residents.

Before addressing the question of the process due Ezekwo, it is necessary to inquire whether she had a constitutionally protected property interest in serving a term as chief resident. "The question whether there was a deprivation of property is logically prior to the question whether there was a denial of due process" *Brown v. Brien*, 722 F.2d 360, 363 (7 Cir. 1983). I think the majority rushed too quickly to answer in the affirmative the question whether Ezekwo had such a property interest.

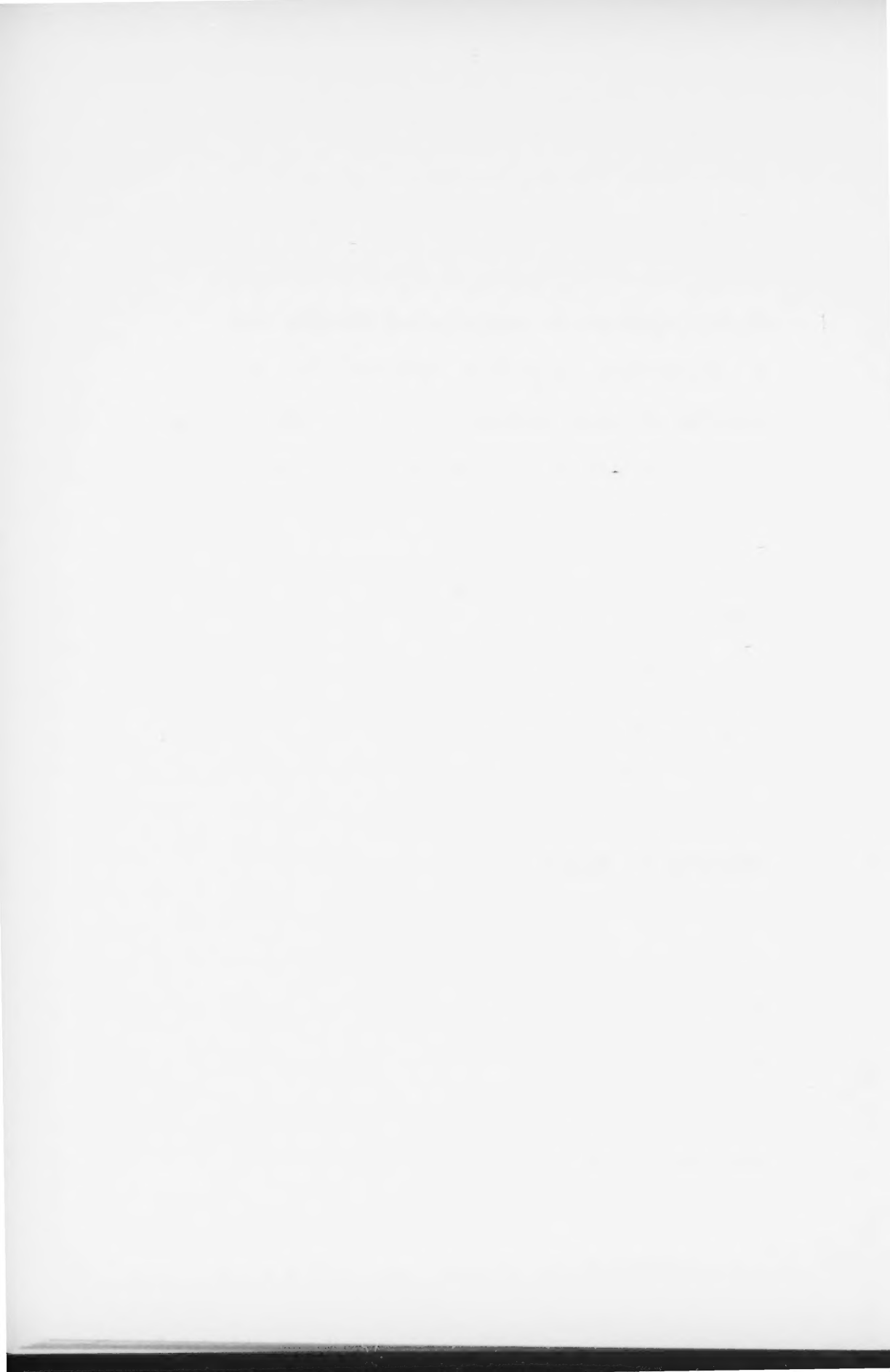
In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court held that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a

legitimate claim of entitlement to it." While "the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978).

The district court held that "[p]laintiff had more than a unilateral expectation of being Chief Resident; the position was offered to applicants as a consideration for applying for the [residency] position." Likewise, the majority held that, even though Ezekwo's "right" to be chief resident was expressed in neither her individual contract nor the residents' collective bargaining agreement, her "expectation of performing the duties of Chief Resident was reasonable and well founded and rose to the level of a property

interest entitled to the protections of the Due Process Clause."

Both the district court and the majority appear to rely largely on implied elements of her contract in holding that Ezekwo had a protectible property interest in the position of chief resident. As the majority itself recognized, however, not every contractual benefit rises to the level of a constitutionally protected property interest. Rather, "[a] mere breach of a contractual right is not a deprivation of property, and thus is not actionable under § 1983. There is a distinction between contract interests and protectible property interests." *Walentas v. Lipper*, 636 F. Supp. 331, 335 (S.D.N.Y. 1986). Even where a public employment contract is involved, "not every breach . . . is a deprivation of property within the meaning of the due process clause." *Brown, supra*, 722 F.2d at 364; see also *Costello v. Town of Fairfield*, 811



F.2d 782, 784 (2 Cir. 1987) ("A contract dispute . . . does not give rise to a cause of action under section 1983."). Thus, even if one assumes that appellees breached a contractual obligation, it does not necessarily follow that they deprived Ezekwo of a constitutionally protected property interest.

In *Rode v. Dellarciprete*, 646 F. Supp. 876, 880 (M.D. Pa. 1986), *vacated in part on other grounds*, 845 F.2d 1195 (3 Cir. 1988), the court held that "personnel decisions short of termination do not constitute deprivations of a property interest under the Fourteenth Amendment." See also *Parrett v. City of Connersville*, 737 F.2d 690, 693 (7 Cir. 1984) ("we [have] expressed doubt whether a lateral transfer, involving no loss of pay, could ever be sufficient deprivation to violate the Fourteenth Amendment. A contrary conclusion would subject virtually all

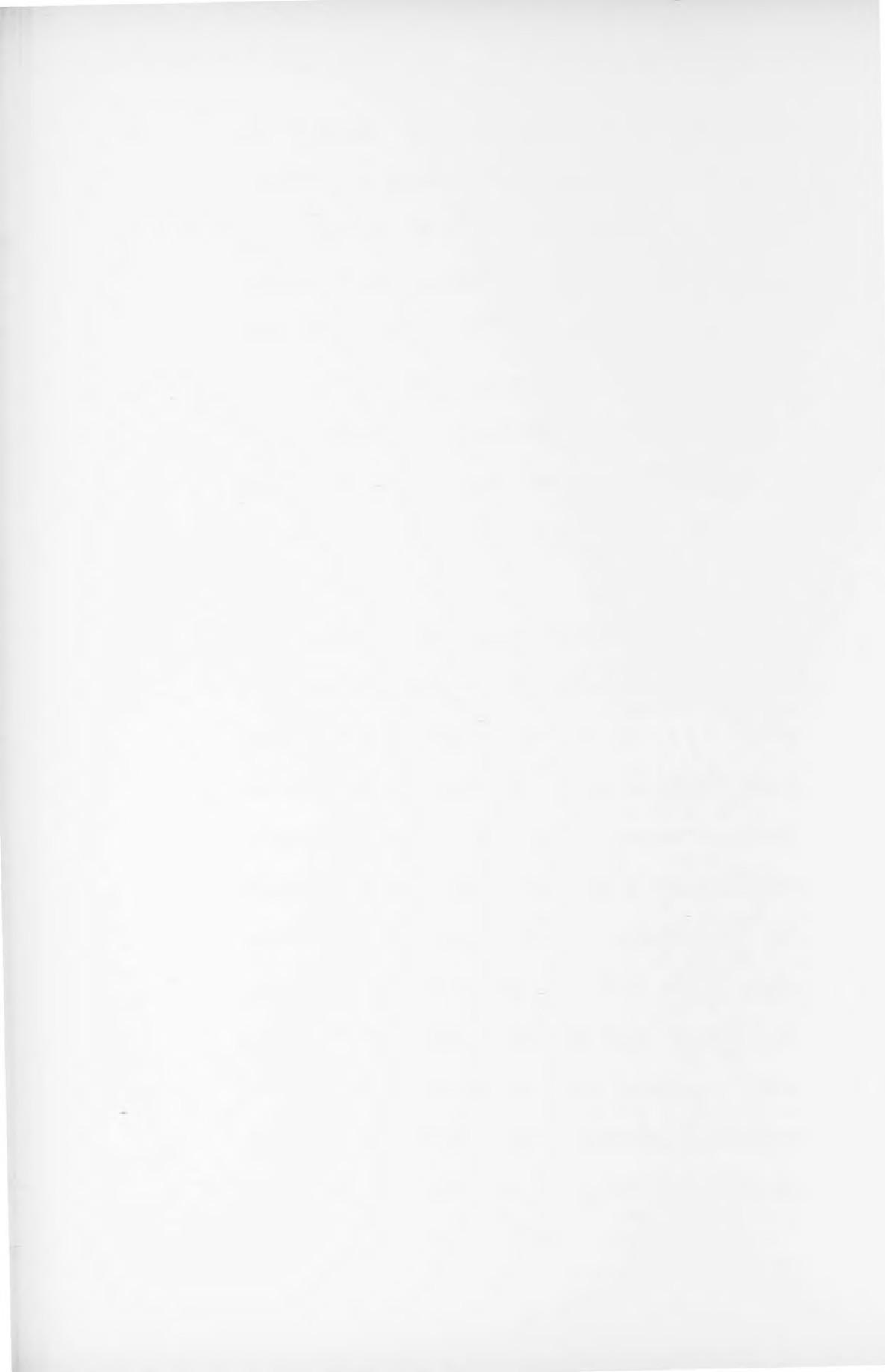


personnel actions by state and local government agencies to potential federal damage suits under 42 U.S.C. § 1983 -- a breathtaking expansion in the scope of that already far-reaching statute, and one remote from the contemplation of its framers"); *Brown, supra*, 722 F.2d at 364-65 ("A breach of contract that does not terminate the employment relationship is different. . . . [T]he Constitution must not be trivialized by being dragged into every personnel dispute in state and local government. Disputes over overtime, over work assignments, over lunch and coffee breaks do not implicate the great objects of the Fourteenth Amendment."); *Lewandowski v. Two Rivers Public School Dist.*, 711 F. Supp. 1486, 1495 (E.D. Wis. 1989) ("mere transfers and reassignments have generally not been held to constitute a constructive discharge or to implicate a constitutionally protected property

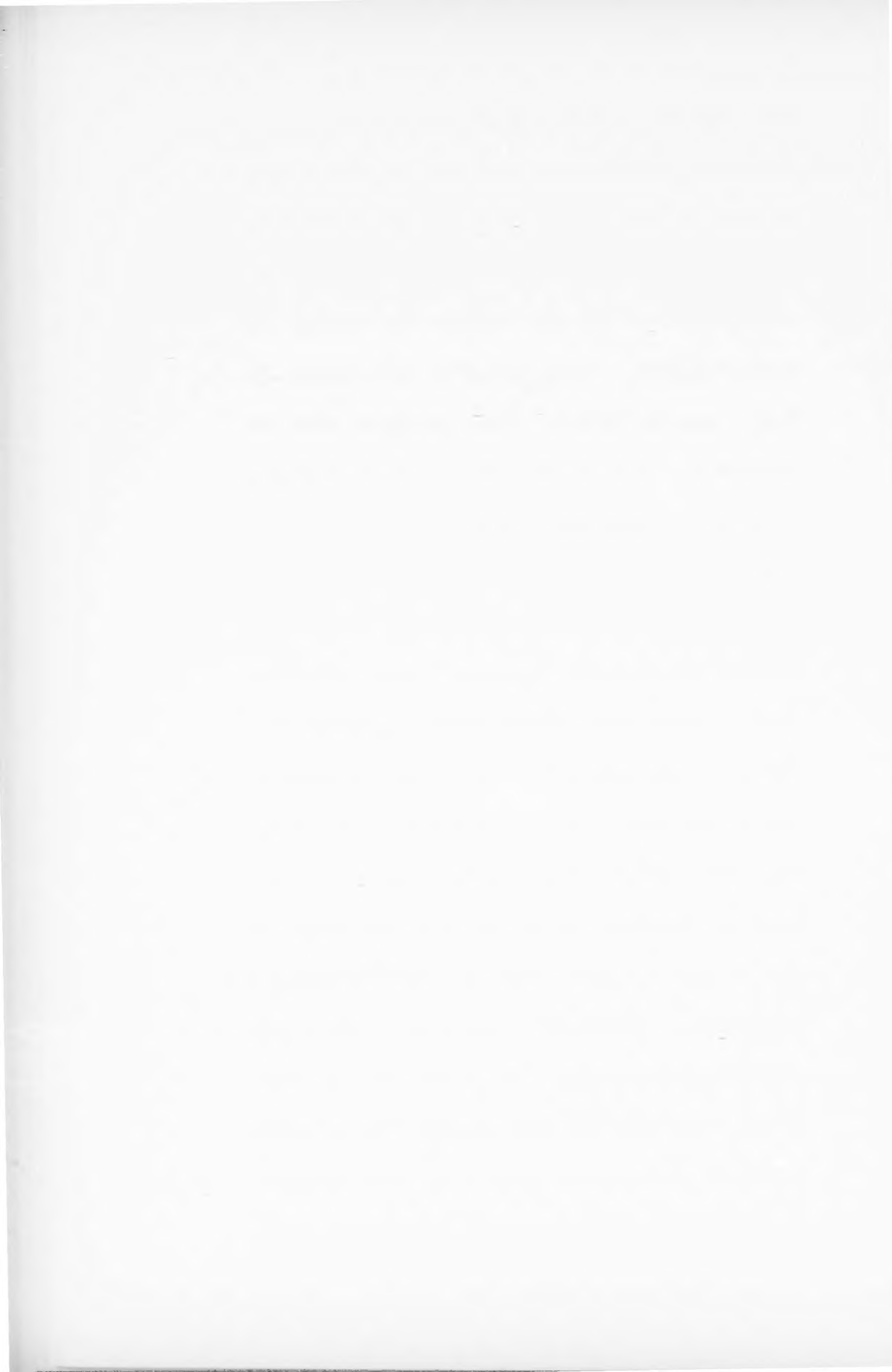


interest") (collecting cases); *Wargat v. Long*, 590 F. Supp. 1213, 1215 (D. Conn. 1984) (following analysis of *Brown* and specifically holding that decisions involving plaintiff state trooper's "transfer [with loss in pay] from one position to another and the failure to promote him . . . are not of a magnitude requiring the plaintiff's employer to afford him due process of law").

"Only interests substantial enough to warrant the protection of federal law and federal courts are Fourteenth Amendment property interests. Whether an interest is that substantial depends on the security with which it is held under state law and its importance to the holder." *Brown, supra*, 722 F.2d at 364 (citation omitted). In holding that Ezekwo's interest in being chief resident rose to such a level, the majority invokes the Supreme Court's decision in *Perry v. Sindermann*, 408 U.S.



593, 602-03 (1972), where the Court held that respondent was entitled to prove that he had a "legitimate claim of entitlement to continued employment" based on the policies and practices of the college by which he was employed. The majority also relies on *Roth, supra*, which, while holding that an "abstract concern" in being rehired did not constitute a property interest, 408 U.S. at 578, articulated the familiar standard that a "legitimate claim of entitlement" can give rise to a property interest. *Id.* at 577. Both *Roth* and *Sindermann* involved the right to employment itself. *Cf. Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (due process requires some kind of hearing "prior to the discharge of an employee who has a constitutionally protected property interest in his employment"), *aff'g* 721 F.2d 550 (6 Cir. 1983). Outside the employment context, the Supreme Court has held that due process



applies to the withdrawal of welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970), and to the termination of Social Security disability benefits. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). As the Court explicitly stated in *Mathews*, "the interest . . . in . . . these benefits is a statutorily created 'property' interest protected by the Fifth Amendment." *Id.*

I have difficulty in equating the non-realization of Ezekwo's expectation of serving a term as chief resident with the loss of employment or of subsistence benefits. As we have stated, "[t]hus far, the course of the law in this Circuit has not moved beyond according procedural due process protection to interests other than those well within the contexts illustrated by *Goldberg* and *Roth*." *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 967 (2 Cir. 1988). In that case, we held that S & D's "right" to continue a contract with the City

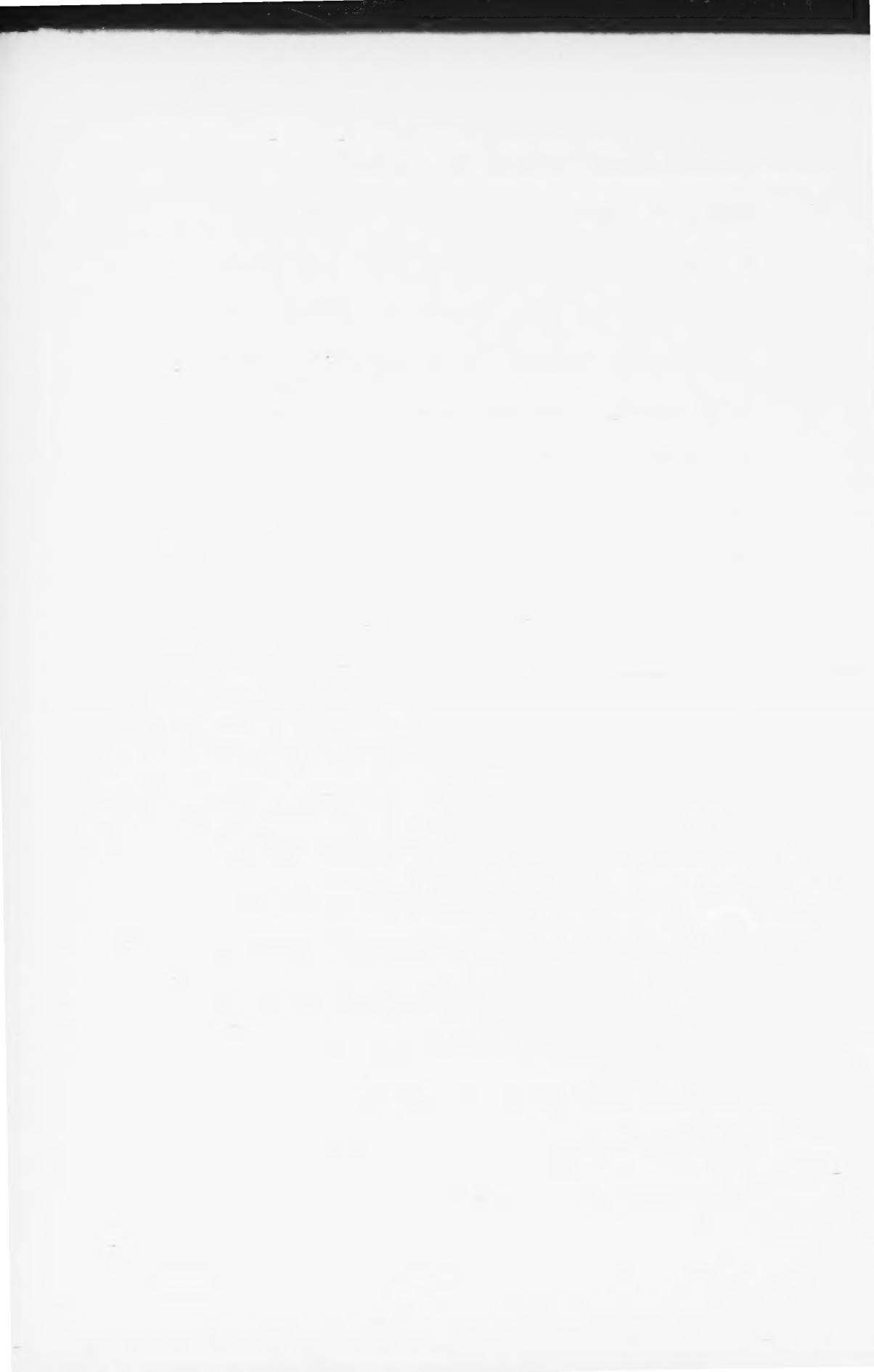


"would not be a [constitutionally] protected right, even if we were to analogize S & D's service contract to an employment contract." *Id.*; see also *Walentas v. Lipper*, 862 F.2d 414, 419 (2 Cir. 1988) ("[T]he Court has carefully limited the rule to situations which involve contracts with tenure provisions and the like, or where a clearly implied promise of continued employment has been made. Courts have accordingly been wary of the consequences that might arise if section 1983 were expanded to encompass substantially all public contract rights." (citations omitted)), *cert. denied*, 440 U.S. 1021 (1989). It is just such expansion which concerns me today.

It should be borne in mind that Ezekwo was not terminated from her position as an ophthalmology resident. Rather, she was simply not permitted to serve a four-month term as chief resident. Appellees made this



decision based strictly on academic criteria. While I agree with the majority that Ezekwo's interest in serving as chief resident was not "such a trivial and insubstantial interest as the purported right to a specific vacation period," see *Altman v. Hurst*, 734 F.2d 1240, 1242 (7 Cir.), cert. denied, 469 U.S. 982 (1984), I do equate her interest with that of an employee who has been denied a promotion or a specific job assignment. See *Lewandowski*, supra, 711 F. Supp. at 1495; *Wargat*, supra, 590 F. Supp. at 1215; see also *Brown*, supra, 722 F.2d at 365. The majority points to no court which has yet held that such an interest rises to the level of a protectible property interest. Rather, I find persuasive the reasoning of those courts which have found that employment decisions short of termination do not involve property rights. As the Supreme Court has cautioned, "[t]he federal court is not



the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 426 U.S. 341, 349 (1976).

Moreover, in an academic context such as this case presents, I think we should be particularly wary of finding property rights that are not firmly grounded in state law. See *Board of Curators v. Horowitz*, 435 U.S. 78, 82 (1978) (involving dismissal from medical school) ("Respondent has never alleged that she was deprived of a property interest. Because property interests are creatures of state law, *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972), respondent would have been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law. Instead, respondent argued that her dismissal deprived her of 'liberty' by substantially impairing her opportunities to continue her medical



education or to return to employment in a medically related field.") (holding process sufficient, even if a protected liberty or property interest were assumed). If every change in academic policy that affected students' expectations were found to implicate property interests, school might well be reluctant to upgrade standards or to make other decisions that traditionally have been left largely to the discretion of academic decisionmakers. While the majority states that "the adverse action taken in this case was not the product of routine discipline," I believe that, consistent with the factual findings of the district court, it was the product of legitimate academic decisionmaking and not, for example, a retaliatory decision that might implicate due process concerns on that basis. Cf. *Brown, supra*, 722 F.2d at 365 ("A public employer who harassed an employee in order to induce him to give up a substantive

constitutional right, such as freedom of speech, would be violating the Fourteenth Amendment and section 1983.").

I would hold the appellees made an academic decision to change the policy with respect to the position of chief residency, and that this decision did not implicate a protectible property interest of appellant Ezekwo.

III.

Even if I were to agree with the majority that Ezekwo's interest in the chief residency position rose to the level of a protectible property interest, I would hold, as did the district court, that she was given all the process that was due. It is to this question of "due process" that I now turn.

In determining what procedural protections are required by the Constitution, I consider the factors articulated by the Court in *Mathews, supra*:



"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

424 U.S. at 335.

As in *Brown, supra*, "the 'property' of which [Ezekwo was] deprived, if property it is in a Fourteenth Amendment sense . . . , is far down on the scale of Fourteenth Amendment interests." 722 F.2d at 366. Moreover, in the wake of the Supreme Court's decision in *Horowitz, supra*, I think it is treading on thin ice to impose additional procedural requirements in



the context of an academic decision such as this one.

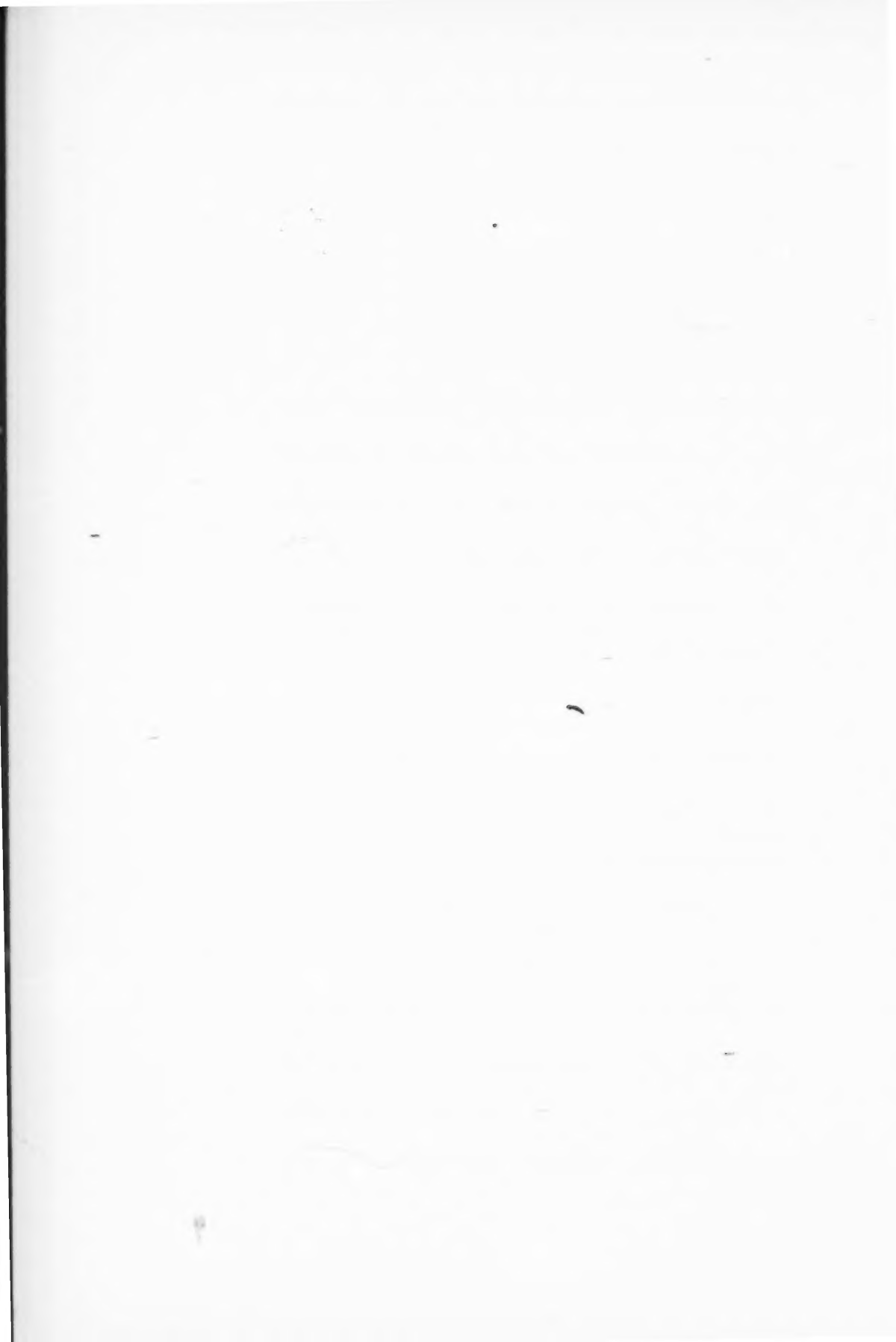
In *Horowitz*, a case involving an outright dismissal from medical school and thus implicating an interest far greater than Ezekwo's in simply serving as chief resident, the Supreme Court indicated a strong reluctance to interfere in academic affairs. In that case, the Court held that academic dismissal decisions, unlike disciplinary dismissal decisions, were not amenable to a hearing requirement:

"Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement. . . . The decision to dismiss respondent . . . rested on the academic judgment of school officials that she did not have



the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Under such circumstances, we decline to ignore the historic judgment of educators and therefore formalize the academic dismissal process by requiring a hearing. . . . We decline to further enlarge the judicial presence in the



academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."

435 U.S. at 89-90.

The majority attempts to distinguish *Horowitz* on the ground that the institution involved there had "long established academic criteria and repeatedly had advised the student involved that her performance was not meeting those standards", whereas:

"The decision to pass over Ezekwo directly resulted from HHC's decision to adopt entirely new selection criteria [which] were not made known to residents in the program until after the final decision on Ezekwo had been made. Such conduct is insufficient to satisfy due process. While a medical residency program is largely an academic undertaking, it is also an employment relationship."



I do not find the majority's attempts to distinguish *Horowitz* to be persuasive. Although arguably more process was accorded Horowitz than Ezekwo, Horowitz's interest was substantially greater. Moreover, there is nothing in *Horowitz* to suggest that the "process" afforded Horowitz represented some type of constitutional minimum. The school in that case informed Horowitz that her clinical progress was unsatisfactory, warned her that there was a danger that she would not graduate, allowed her to be examined by seven physicians, and then ultimately made a "careful and deliberate" decision to dismiss her. *Horowitz, supra*, 435 U.S. at 85. In this case, the majority itself states that "HHC's residency directors and doctors carefully deliberated about changing the method of selection for Chief Resident before deciding to apply that new standard". The mere fact that Ezekwo was not warned in advance of

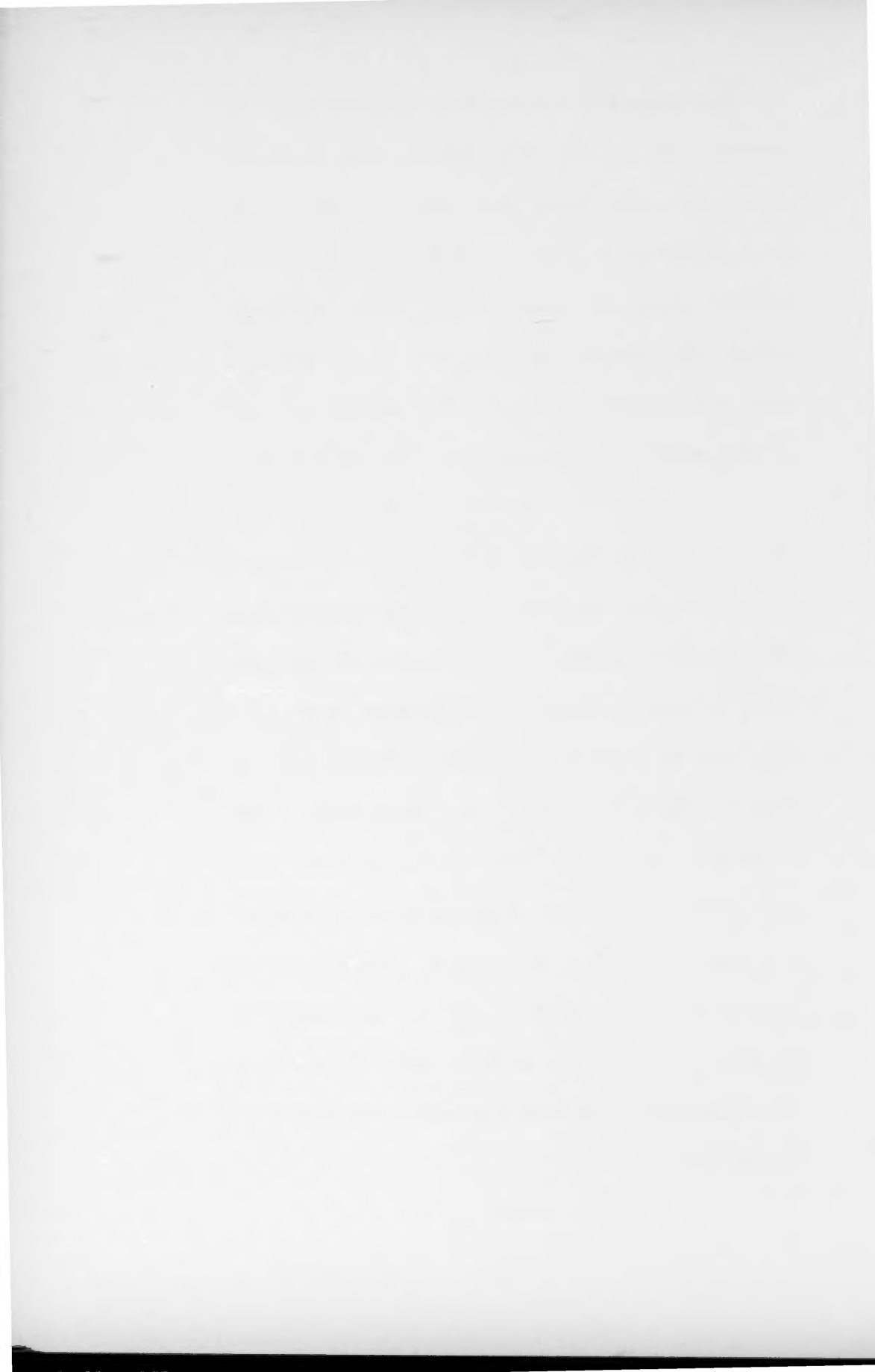


the change or given an opportunity to argue about it does not represent a denial of due process.

As the district court stated, we held in *Campo v. New York City Employees' Retirement System*, 843 F.2d 96, 103 (2 Cir.), *cert. denied*, 488 U.S. 889 (1988), that an Article 78 proceeding in a New York State court offered a due process hearing "at a meaningful time and in a meaningful manner" in a case involving rights to survivor's benefits under a pension. The district court held that Ezekwo "failed to avail herself of the available process to air her claim." In addition to have had the opportunity to commence an Article 78 proceeding, Ezekwo may well have a legitimate contract action. *See Campo, supra*, 843 F.2d at 103 n.7. These post-deprivation remedies are relevant in assessing the process that Ezekwo had available to her.



The majority states that in *Zinermon v. Burch*, 110 S. Ct. 975 (1990), the Supreme Court recently held that the availability of post-deprivation state remedies will not bar a § 1983 claim in cases other than those in which the alleged deprivation is so random and unpredictable that the provision for predeprivation proceedings is impossible. *E.G., Parratt v. Taylor*, 451 U.S. 527, 541-44 (1981) (state tort action sufficient protection for alleged intentional destruction of prisoner's property), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). In *Burch*, however, the Court limited itself to assessing the propriety of a Rule 12(b)(6) dismissal, and held that respondent had adequately alleged a claim for relief in a case involving the involuntary commitment of a mentally ill person. 110 S. Ct. at 977. The Court held that the case was not precluded by *Parratt*. *Id.* at 989.



I do not read *Burch* as suggesting that predeprivation remedies are always required in cases other than those involving random and unpredictable deprivations such as that at issue in *Parratt*. Nor do I read *Burch* as making irrelevant the consideration of other postdeprivation remedies in assessing the adequacy of constitutional process. Indeed, the Court explicitly acknowledged that "[i]n some circumstances, . . . the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Id.* at 984; *see also* *Loudermill*, *supra*, 470 U.S. at 542 n. 7 ("There are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements."). An example cited in *Burch* is *Ingraham v. Wright*, 430 U.S. 651, 682 (1977), where the Court held that the due process clause does not require notice and a hearing before the imposition of



corporal punishment in public schools "as that practice is authorized and limited by the common law". The Court held that "imposing additional administrative safeguards as a constitutional requirement might reduce [the] risk [of violating a child's rights] marginally, but would also entail a significant intrusion into an area of primary educational responsibility." *Id.*

Burch simply held that the facts of that case did not fall within the reach of those cases not requiring a prior hearing under the special rationale of *Parratt*. *Burch* involved the alleged involuntary confinement of an individual, which confinement the Court described as implicating a "substantial liberty interest". *Id.* at 986. In this case, where only an insubstantial, if any, property interest was involved, the existence of postdeprivation remedies in the wake of a legitimate academic decision afforded Ezekwo all the process that was due. As the court



held in *Ramsey v. Board of Educ. of Whitley County*, 844 F.2d 1268, 1272 (6 Cir. 1988), "an employee deprived a property interest in a specific benefit, term, or *condition of employment*, suffers a loss which is defined easily . . . and therefore, any interference with that interest is redressed adequately in a state breach of contract." (Emphasis added.)

Finally, in the context of considering the *Mathews* factors, I agree with the majority that "it is unlikely that the administrators would have reversed the decision to change the selection criteria" even if additional process had been accorded Ezekwo. This serves to support my view that any additional "process" requirements would represent only an unnecessary administrative burden.

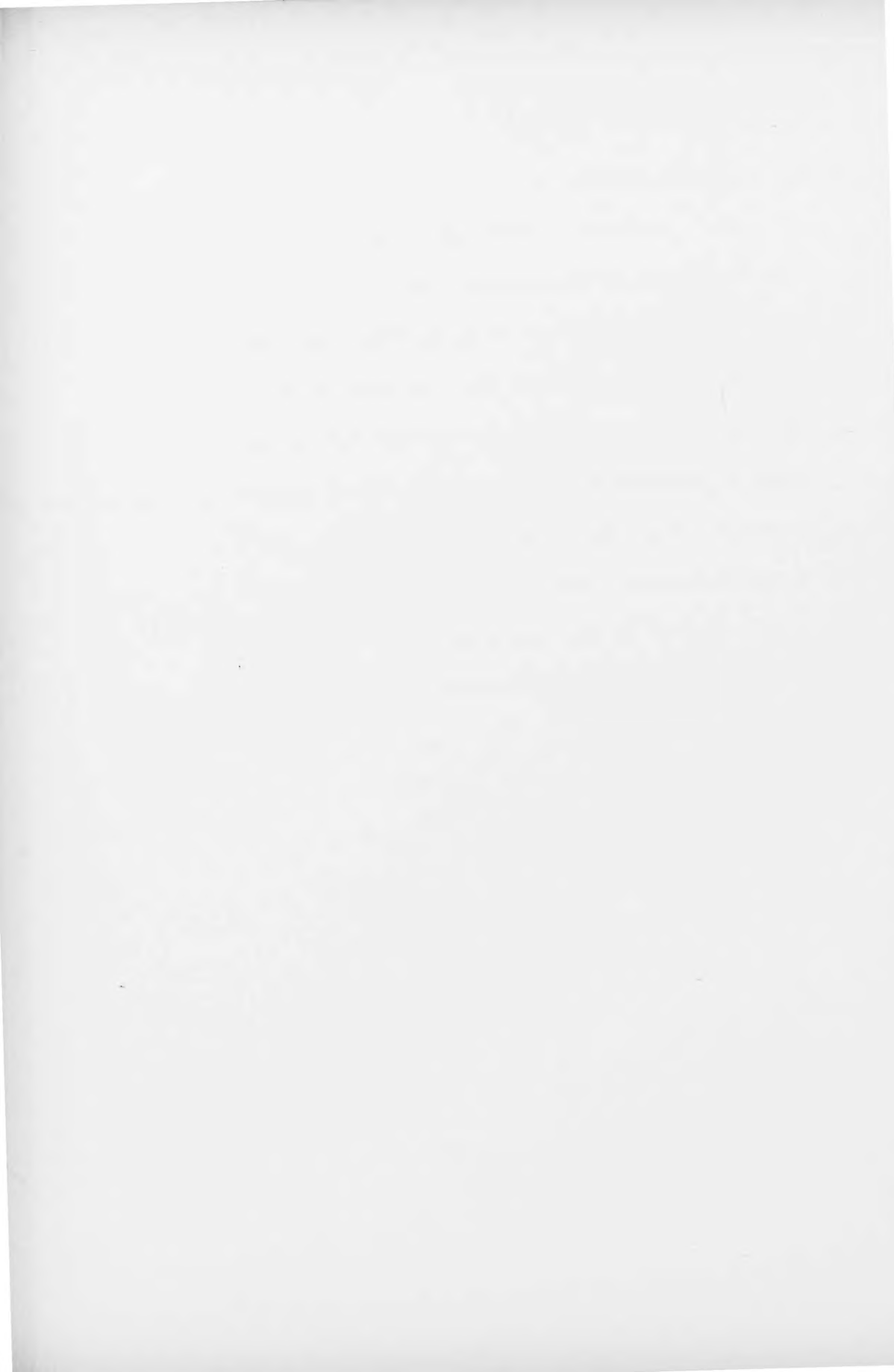


IV.

To summarize:

The district court properly rejected appellant's first amendment claim.

The district court finding that the chief residency decision was an academic decision is amply supported by the record and is not clearly erroneous. Ezekwo's interest in the position did not rise to the level of a constitutionally protected property interest but, even if it did, Ezekwo was afforded all the process that she was due.



MANDATE

United States Court of Appeals

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of August, one thousand nine hundred and ninety-one.

Present: HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
HON. GEORGE C. PRATT,
Circuit Judges.

-----X

DR. IFEOMA EZEKWO,

Plaintiff-Appellant,

-against-

Docket No.
90-9076

NYC HEALTH & HOSPITALS
CORPORATION; HARLEM HOSPITAL
CENTER; COLUMBIA UNIVERSITY,
College of Physicians and
Surgeons; DR. LINSY R. FARRIS,

Defendants-Appellees.

-----X

Appeal from the United States District Court for the Southern District of New York.



This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel

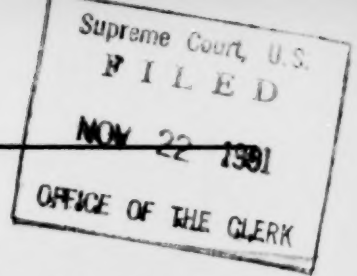
ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE
Aug. 23, 199

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No. 91-672



In The

Supreme Court of the United States

October Term, 1991

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION; HARLEM HOSPITAL CENTER;
COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND
SURGEONS; and DR. R. LINSY FARRIS,

Petitioners,

vs.

DR. IFEOMA EZEKWO,

Respondent.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

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*On Petition for a Writ of Certiorari to the United States Court
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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Both courts below agreed that respondent, Dr. Ifeoma Ezekwo, had a property right in the position of chief resident

(A7, 42-48). Contrary to petitioners' suggestion, that property right was solidly based on petitioners' own persistent practices, the express representations petitioner Harlem Hospital Center (HHC) made to the respondent (JA35-36) and the brochures which HHC published and disseminated to prospective residents (JA36, 150, 492, 503), including respondent, who reasonably relied upon such representations.¹

Each department resident served as chief resident until Dr. Ezekwo's turn in November 1987 (JA76, 337-338). HHC had no standard which residents had to meet prior to such service. Acceptance in the residency training program qualified physicians for this service (JA76). However, after Dr. Ezekwo criticized the residency program, its director, Dr. Farris, and some of the attending physicians, she was denied this tangible benefit.

Petitioners' suggestion that Dr. Ezekwo received any form of due process — either before or after this deprivation — is entirely baseless. On the contrary, in June 1987, resident coordinator Delorme told respondent that she *would* serve as chief resident commencing November 1, 1987 (JA72-76).

In August 1987, Dr. Farris discussed with the attending physicians whether Dr. Ezekwo should be permitted to serve as chief resident (JA163-164). This atypical discussion (JA166) did not involve any alleged academic failures, but, rather focused on

1. While petitioners contend that nothing in these written materials "guaranteed" respondent that she would serve a stint as chief resident, the Ophthalmology Department's Housestaff Manual, published in June 1987, unequivocally states: "The residency staff is composed of nine residents, three at each of the year levels of training. In the third year, four months are spent as chief resident." (JA492). The HHC brochure which respondent received and relied upon in applying to the program in 1981 contains precisely the same statement (JA503).

Dr. Ezekwo's allegations against the department, the director and some of the attending physicians. At this one meeting, the attending physicians did not reach any substantive conclusion, but confirmed Dr. Farris' authority to handle Dr. Ezekwo as he saw fit (JA168).

At no time did Dr. Farris as much as speak with Dr. Ezekwo about the memoranda she wrote concerning the department during the summer of 1987, her OKAP scores or her allegedly deficient surgical skills (JA99, 159). Neither Dr. Farris nor Dr. Delorme ever suggested that these matters, taken together, or any of them individually might cause even a reconsideration of her projected stint as chief resident, let alone deprivation of this right. *Id.*

In short, the courts below properly held that HHC created a property interest in the position of chief resident; that Dr. Ezekwo was one of a number of beneficiaries of this entitlement and that petitioners violated the Due Process Clause in terminating her entitlement without *any* modicum of due process.

As the courts below properly resolved the first issue (the existence of a property right) and the Court of Appeals for the Second Circuit properly adjudicated the second (the absence of required due process), this Court should deny petitioners' petition for a writ of certiorari.

STATEMENT OF FACTS

Respondent next addresses only factual errors or distortions which petitioners have included in their statement of facts.

1. Dr. Farris sponsored Dr. Ezekwo for the HHC residency program. He wrote positive letters of reference for her based on their pre-residency contact. His initially favorable attitude toward respondent was based on his own positive personal experiences,

not some abstract or uninformed hope that she would or could succeed in the program (JA449, 450).

2. The chief resident develops the on-call schedule for the other residents and assigns them cases when he is on call, often giving himself the most challenging patients (JA104, 599). In this manner, each third-year resident self-assigns a sufficient diversity and quantity of surgical cases to meet the requirements imposed by the national accrediting agency (JA576-579).

3. HHC assured each resident that (s)he would serve as chief resident during his/her third year. This practice was in place as early as 1973 (JA149) and certainly in 1981, when Dr. Ezekwo first expressed interest in the program (JA35-36).

4. Serving as chief resident is a qualification considered by physicians in awarding post-residency fellowships (JA260). This is particularly true here, where HHC had an established practice of having everyone serve as chief resident and where deprivation of that right naturally raised serious questions as to a candidate's worthiness.

5. Dr. Ezekwo's memoranda to the program director, Farris, were not widely circulated by her, but rather written to the person responsible for operating a failing program, one on probation with the accrediting agency for deficient staffing and course offerings (JA238-239). The memoranda mentioned attending physicians only to the extent that respondent claimed — in specific and cited cases — that they had engaged in egregious and proscribed conduct, contrary to program regulations. The memoranda were not, as petitioners portray them, unguided missives aimed at attacking others. Specifically:

(a) Dr. Ezekwo repeatedly reported to Dr. Farris that some attending physicians, paid from the public fisc, were not appearing,

as scheduled, to cover clinical or surgical responsibilities, thereby rendering the public health clinics unable to serve patient needs (JA69, 444-445); (complaint that Dr. Bansal had failed to timely attend to clinical responsibilities (JA460-462); (noting Dr. Rice's failure to cover Sydenham Clinic on June 12 and 26, 1987) (JA475-476, 554); (complaining that Dr. Tiwari wished to leave the clinic early on Wednesdays, his scheduled cover day) (JA540); (noting Dr. Bansal's failure to cover the glaucoma clinic for assigned hours) (JA541); (reporting Dr. Delorme's tardiness for coverage at Sydenham Clinic).

(b) Dr. Ezekwo noted that the equipment available at Harlem Hospital Center was regularly dysfunctional (JA71, 74), again detrimentally affecting patient care, as well as the proper training of residents (JA447, 463, 465-466, 471-472, 538).

(c) Dr. Ezekwo also reported that the program was failing to provide residents with the training they were supposed to receive (JA443-444, 463-464) and that scheduled morning rounds did not occur (JA454).

6. By and large, Dr. Farris found Dr. Ezekwo's reports well-founded and true. But, he was unable to clean up the department and became frustrated with respondent. He yelled at her inappropriately (JA52) and later apologized for his outbursts (JA434) ("I apologize for any ungentlemanly behavior and can only explain it as a reaction to many of the inefficiencies and inconveniences that we all suffer during patient care at Harlem Hospital . . ."). Dr. Farris deprived Ezekwo of the chief residency to punish her for telling the truth about the sad state of the residency program and the department.

7. The department rated residents twice each year. In June 1987, Farris and Delorme rated Ezekwo better than average in overall performance (JA550-553). This occurred *after* HHC had

received the 1987 OKAP scores. Thereafter, Delorme told Ezekwo that she would serve as chief resident starting in November 1987 (JA72-76). Nor did Farris or Delorme confront respondent with any accusation thereafter made against her (JA256-257). Neither Farris nor Delorme ever intimidated or indicated (in any way) that Ezekwo was in danger of losing her chance to serve as chief resident (JA183). Respondent learned this only after Dr. Solomon had scheduled a meeting after November 1, 1987 and made clear that he was to continue to serve as chief resident. Unlike plaintiffs in most cases petitioners cite, this respondent had no notice, let alone any opportunity to contest, the deprivation of rights petitioner visited upon her.

8. As other residents, Dr. Ezekwo was to gain the bulk of her surgical experience and training during the last year of her residency. Contrary to petitioners' current contention that respondent's poor surgical skills resulted in the decision to deny her the chief residency, at trial Dr. Farris testified that as of September 1987, respondent had "average" surgical skills (JA180). Moreover, during her second year, respondent had been denied usual surgical training and Dr. Farris knew about this (JA46-47).

9. In September 1987, several attending physicians, including Farris, wrote supportive letters of reference as Dr. Ezekwo applied for fellowship programs (JA484-485, 573-575). The contents of these letters belie the existence of any widespread animosity between Dr. Ezekwo and the attending physicians. Moreover, head nurse Rance testified at trial that Dr. Ezekwo performed well and had consistently fine relationships with patients and fellow staff (JA289).

10. The October 16, 1987 meeting, at which Farris decided to deprive Ezekwo of her chief residency, was a conference concerning the pending internal equal employment opportunity charge respondent had filed against Farris. Dr. Ezekwo was not

present, but, instead, Farris met with high-ranking administrators from Columbia University and Harlem Hospital (JA456). In retaliation against respondent's filing of the EEOC charge and out of frustration with her legitimate and factual complaints about the department, Farris first proposed dropping respondent from the three-year residency program. He later determined to deny her the promotion which the chief residency position represented. While Farris justified this decision by reference to Ezekwo's speech and conduct, he never so much as confronted her about any such matter, either personally or in written form (JA183).

11. The October 1987 "change of policy" memorandum contained no standards for the selection of a chief resident, but was instead a unilateral change in department rules intended to cover the denial to respondent of her promotion (JA459). Nor did the department later adopt any specific standards or measures for the selection of chief resident.

REASONS FOR DENYING THE WRIT

1. Both the district court and the Court of Appeals correctly held that respondent had a property interest created by petitioners' own past practices and written publications. These sources provided Dr. Ezekwo with a "legitimate claim of entitlement" to the position of chief resident. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). This finding of fact should not be disturbed here.

2. The district court properly rejected petitioners' suggestion that Dr. Ezekwo's was a "unilateral expectation" rather than an entitlement.

Before applying for the position, plaintiff read the brochure describing the procedure whereby each of the residents would be chief resident during their

third year in the program. Plaintiff had more than a unilateral expectation of being the chief resident; the position was offered to applicants as consideration for applying for the position. Plaintiff clearly had a right to expect that defendants would live up to their offer of the appointment. Consequently, she did have a property interest in being appointed to that position.

(A8).

Similarly, the Court of Appeals noted that parties "through their conduct and practice can create additional rights and duties" which are not specified in a written contract (A43). Here,

HHC adopted a policy and practice of awarding the position of chief resident to all third year residents on a rotating basis. This method of selection was not haphazardly applied; it was an established practice which was expressly highlighted in HHC's informational documents . . . It is plain that this practice predated Ezekwo's admittance to the program and continued while she was there. Ezekwo's expectation of obtaining the position was further enhanced when she was verbally advised in June 1987 that she would be chief resident from November 1987 through February 1988.

(A47).

This course of conduct "created a contractual right that rose to a level of a significant property interest that would be protected under state law." *Id.*

4. In short, even accepting petitioners' formulation that nothing less than employment itself constitutes a property interest, respondent *was* denied the distinct and specific position of chief resident, one undeniably superior in salary, prestige and responsibilities to that of resident. While this case is *not* about the termination of respondent's residency, it is about the denial of elevation to an indisputably higher and promised position without any modicum of due process whatsoever.

In this light, analogizing Ezekwo's interest in this new position, which carried financial and less tangible advantages (A48), with deprivations of much more trivial job-related benefits is, as the Court of Appeals concluded, "unpersuasive" and faulty.

5. Petitioners suggest that the decision below conflicts with opinions rendered by other Circuits, creating a division of authority which this Court should resolve.

To the contrary, petitioners have presented no such conflict. The nature of due process analysis will inherently lead to fact-intensive weighing of rights and interests and, consequently, different due process rights will be accorded to their holders. This Court cannot review each such case nor do any more than provide general guidance as to the nature of claims to be afforded constitutional protection and the kinds of protection which ought be provided.

Critically, petitioners have not suggested that the Second Circuit opinion conflicts with *any* guidance provided by this Court's precedents. And, the conflicts petitioners invent with other Circuits simply do not exist.

In one line of cases, petitioners cite to, the district and appellate courts expressly found, unlike here, that plaintiffs had no protected entitlement or, to put the matter another way, lacked

an entitlement both recognized by state law or practice and of sufficient moment to warrant constitutional recognition. For instance, in *Greenberg v. Kmetko*, 840 F.2d 467, 475 (7th Cir. 1988), the Seventh Circuit repeated its prior-expressed reluctance "to find a transfer [of a state employee] to the same pay level to be a violation of the Fourteenth Amendment." See *Parrett v. City of Connersville*, 737 F.2d 690, 693 (7th Cir., 1984), *cert. dismissed*, 469 U.S. 1145, 105 S. Ct. 828, 83 L. Ed. 2d 820 (1985). This principle presents no conflict with that applied by the Second Circuit below. Dr. Ezekwo did not claim that a lateral transfer deprived her of a property interest triggering due process protection. Rather, her interest was in a superior position, with both tangible and intangible advantages.

Likewise, in *Dorsett v. Board of Trustees*, 940 F.2d 121 (5th Cir. 1991), the plaintiff, an aggrieved university professor, was not terminated or deprived, as respondent was here, of any entitlement or promotion to which he had a right. Rather, he claimed that the university harassed him by failing to accord him certain discretionary benefits which the Fifth Circuit characterized as "relatively trivial". As Dorsett was *not* deprived of any property right, but rather denied discretionary advantages, his claim is not comparable to that adjudicated here. Accordingly, the decision of the Fifth Circuit does not conflict with the one rendered below².

Similarly in *Brown v. Brien*, 722 F.2d 360 (7th Cir. 1983), the Seventh Circuit affirmed the district court's holding that a sheriff's failure to pay promised overtime salary was not a deprivation of property sufficient to trigger due process protection. *Brown* involved an administrative decision required by a shortfall

2. Nor do petitioners fairly represent this holding when they describe the deprivations Dorsett alleged as "contractual employment benefit". The Fifth Circuit described "various administrative decisions" which denied certain benefits to Dorsett, but never found that plaintiff had any entitlement to these. *Id.* at 123.

in funds, not specific dissatisfaction with the performance of one or another subordinate. The sheriff did deprive his deputies of accrued compensatory time, but due process protections were not extended because of the generalized nature of the injury and its uncontested financial justification. This logic is consistent with that applied by the Second Circuit here, not conflicting.

In another line of cases which petitioners claim raises a conflict with the decision below, the aggrieved parties had protected rights and, unlike respondent, were provided sufficient and real pre-deprivation notice and hearings. See *Carter v. Western Reserve Psychiatric Habilitation*, 767 F.2d 270, 273 (6th Cir. 1985)³. Such cases present no conflict with the decision below.

6. As shown above, the Second Circuit correctly held that petitioners' own conduct and practice created more than a unilateral expectation of entitlement in the position of chief resident. It also and separately concluded that the position of chief resident represented a "significant professional value" to respondent not merely, as petitioners distort, because of the increment in salary associated with it (A48). Rather, the position of chief resident represented the culmination of a person's medical training and was an important credential as the physician sought fellowships and hospital appointments (A11).

When petitioners contend that the decisions below "did not

3. Other appellants in *Carter, supra*, complained that a two-day disciplinary suspension deprived them of protected rights without due process. The Sixth Circuit agreed that "in theory" this discipline constituted a "property deprivation" (at 272, n. 1), but held that it was an instance of "routine discipline" causing a *de minimis* deprivation "not deserving of due process consideration". *Id.* This reasoning does not apply here as Ezekwo was *not* disciplined in a routine manner, but denied a once-in-a-lifetime opportunity with consequences for her career.

establish its importance at all" (Petition at 33), they invite this Court's review of findings of fact, not an appropriate reason for seeking the exercise of this Court's jurisdiction.

7. Accepting, as this Court should, that Dr. Ezekwo had an entitlement to the position of chief resident and that this position had "significant professional value" to her, this Court should not engage in the micro-management of Circuit decisions weighing the due process protections which ought be accorded before the deprivation of quite different rights. Petitioners suggest that other Circuits have found that certain contractual rights do not trigger due process protection and that the Second Circuit's conclusion that denial of chief residency does require some pre-deprivation process conflicts with these.

However, the decision below does not conflict with either *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) or *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). In *Loudermill*, *supra*, at 542, this Court required the public employer to provide pre-termination notice and the opportunity to be heard before discharge. In *Ewing*, the Court found that the due process provided sufficed to satisfy constitutional standards. Neither case conflicts with the decision below.⁴

Nor does the decision below conflict with *Unger v. National Residents Matching Program*, 928 F.2d 1392 (3d Cir. 1991) in

4. Petitioners suggest that if remaining in a degree-granting program is a dubious property interest then the claim to have a property right to serve in a promised chief residency position is "utterly baseless". But, this argument ignores the fact that Ezekwo was an *employee*, not merely a student. She was paid by the state to perform medical services, as she completed her own training. She was denied an employment opportunity of significant professional value not for academic reasons, but because of other alleged deficiencies which could well have been the subject of pre-deprivation notice and review.

which the Third Circuit affirmed the district court's grant of Temple University's motion to dismiss a claim brought by a prospective medical school resident precluded from attendance due to the university's elimination of the program which had admitted her. Unger argued that by discontinuing its entire dermatology residency program after her admission, Temple denied her procedural due process in violation of 42 U.S.C. § 1983. *Id.* at 1395.

The Third Circuit noted that in *Regents of Michigan v. Ewing, supra*, and *Board of Curators v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978), this Court "assumed without deciding that students currently attending school had a property interest in the continuation of their education." *Id.* at 1397. As Unger was not yet an enrollee, the Third Circuit reasoned, these cases did not assure her of any procedural rights. The Court of Appeals likewise rejected Unger's claim that before it could break its contract with her, Temple needed to accord her procedural due process and held, instead, that not every breach of contract by a state actor rises to the level of a constitutional deprivation.

In so holding, the court expressly recognized two kinds of contract breaches which do warrant constitutional protections: "the first type arises where the contract confers a protected status, such as those 'characterized by a quality of either extreme dependence in the case of welfare benefits, or permanance in the case of tenure, or sometimes both, as frequently occurs in the case of social services'," citing to *S&D Maintenance Co. v. Goldin*, 844 F.2d 962, 965-67 (2d Cir. 1988); the second arises "where the contract itself includes a provision that the state entity can terminate the contract only for cause." *Id.* at 1399.

Here, the district court correctly held that, upon admission to the residency program, Ezekwo was granted the unequivocal right to serve as chief resident. As Judge Metzner held, "[P]laintiff

had more than a unilateral expectation of being Chief Resident; the position was offered to applicants as condition for applying for the position. Plaintiff clearly had a right to expect that defendants would live up to their offer of the appointment.” (A8). The Court of Appeals held that this right could only be deprived after petitioners provided respondent notice of any new criteria they intended to impose as qualifications for service as chief resident and the opportunity to show that either she met the new criteria or that they should not apply to defeat her settled expectation (A57-58). The nature of Ezekwo’s contractual entitlement differentiates her claim from that advanced by Unger who did not allege in any manner that Temple’s contract allowed it to cancel its dermatology residence program only for cause. *Id.* at 1399.

Other cases cited by petitioners are even less apposite. In *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1443-44 (11th Cir. 1991), before denying a neurologist radiology privileges, the hospital afforded him ample opportunity to argue his case before the relevant review committees. Moreover, as the Eleventh Circuit held, the hospital’s denial of his application for additional privileges did not abrogate any extant contractual right Todorov possessed. *Id.* at 1463. As it concluded, “Dr. Todorov does not claim any contractual right in additional privileges; he only alleges a contractual right in the standards DCH uses to grant privileges. If, however, there is no protected interest in the privileges, due process requirements will not delineate the procedures used to grant or deny these privileges.” *Id.* at 1463-64.

As both courts below held that Ezekwo’s contract assured her the right to serve as chief resident, *Todorov* is wholly inapposite and not a source of conflict with the opinion below.

Finally, *Faucher v. Rodziewicz*, 891 F.2d 864 (11th Cir. 1990) does not establish any principle contrary to that relied upon below.

As the Eleventh Circuit held, Faucher had no employment contract with the hospital or with the defendant which guaranteed her anything, *id.* at 869, and thus no basis for a claim that changing the manner of assigning anesthesiology cases deprived her of any protected interest. Staff privileges alone do not amount to such a contract. *Engelstad v. Virginia Municipal Hospital*, 718 F.2d 262, 267 (8th Cir. 1983).

9. The decision below does not conflict with any of the cases cited above nor with *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). In short, the reasoned approach of the Second Circuit persuasively distinguished the instant case from *Horowitz*, where the *student* in question was fully apprised of her failure to meet academic standards and dismissed only after numerous counselling efforts failed to yield satisfactory performance.

In its decision below, the Second Circuit showed the clear inapplicability of *Horowitz* here. It emphasized the following differences:

1. The "academic" standards which petitioners invoked here were "eleventh hour" criteria, not longstanding academic requirements which the institution had long upheld. Indeed, "[t]hese new criteria were not made known to residents in the program until after the final decision on Ezekwo had been made." (A56).

2. Moreover, petitioners never elaborated these new standards and this, combined with the timing of their articulation, "casts some doubt on the truly "academic" nature of the decision here (A53).

3. Ezekwo was provided with absolutely no notice that her academic performance was deemed inadequate or jeopardized her

service as chief resident. Indeed, at her last rating in June 1987, Farris and Delorme informed her that her performance was above average. On the contrary, as the Second Circuit noted, in *Horowitz*, “the medical student, prior to her dismissal from the program, had been advised of the faculty’s dissatisfaction with her clinical progress and informed that these problems could jeopardize her continued participation in the program.” (JA54). As the Court of Appeals explained the distinction, “. . . the institution in *Horowitz* had long established academic criteria and repeatedly had advised the student involved that her performance was not meeting these standards, and that if it did not improve, would prevent her from continued enrollment. Such is not the situation presented here.”

4. The residency program is “an employment relationship” as well as an academic undertaking. This characteristic also distinguishes the instant case from *Horowitz*, where the student had no unequivocal guarantee to a particular entitlement like service as chief resident.

Against these distinctions, petitioners still contend that *Horowitz* is controlling here. This position is simply baseless and does not recognize the significance of the critical differences noted above. While the district court found the deprivation here to be “academic in nature”, upon review, the Second Circuit concluded that this finding was dubious at best and that the decision was one of mixed nature — at least in part disciplinary.

The post-*Horowitz* cases which petitioners cite do not stand in conflict with the decision below and, indeed, support it. In *Hankins v. Temple University*, 829 F.2d 437 (3rd Cir. 1987), the residency program provided the physician explicit notice that her performance was deficient and would, if not improved, cause her separation from the program. Moreover, upon being informed for the second time of her deficiencies, Dr. Hankins “left the

hospital, leaving her patients unattended.” *Id.* at 439.

These salient facts distinguished *Hankins* from the instant case where Dr. Ezekwo never received *any* warning that her alleged academic deficiencies were jeopardizing her service as chief resident and never took any action which in the least threatened patient safety.

Critically, as the Third Circuit noted in *Hankins*, before dismissal from a program, *Horowitz* required at least “an informal-give-and-take” between the student and the administrative body. That is all the Second Circuit required below. But, unlike *Horowitz* and *Hankins*, no such notice or informal give-and-take occurred here. Instead, petitioners kept Dr. Ezekwo in the dark concerning her status until an “eleventh hour” change in standards which were not even announced until after the deprivation of respondent’s rights.

Finally, petitioners’ suggestion that the June 1987 meeting at which respondent was advised of her satisfactory performance satisfied procedural due process is nothing short of absurd (Brief at 47). To the contrary, as petitioners ultimately concede, they afforded respondent no pre-deprivation or post-deprivation process and this conduct clearly violated the Due Process Clause.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be denied in all regards.

Respectfully submitted,

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